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ABSTRACT

This report is the work of the Citizens' Commission on Civil Rights, a bipartisan group of former federal officials with responsibility for equal opportunity. Part 1 contains three chapters: (1) "Introduction"; (2) "Executive Summary and Review"; and (3) "Recommendations of the Commission." Part 2 contains the following working papers: (4) "Minority Poverty: The Place-Race Nexus and the Clinton Administration's Civil Rights Policy" (George Galster); (5) "An Unseen Attack in Civil Rights: The Anti-Regulatory Agenda in the Contract with America" (Gary D. Bass); (6) "The Clinton Record on Judicial Nominations at Mid-Term" (Elliot M. Mincberg); (7) "Interim Report on Performance of U.S. Commission on Civil Rights during the Clinton Administration" (John C. Chambers and Brian P. Waldman); (8) "The Equal Employment Opportunity Commission" (Alfred W. Blumrosen); (9) "The Clinton Administration and Civil Rights Enforcement in Elementary and Secondary Education" (Patricia A. Brannan); (10) "Minority Access to Higher Education" (Reginald Wilson); (11) "In Search of a Vision: Gender Equity in Education in the Clinton Administration" (Verna L. Williams, with assistance from Steven C. Hodge); (12) "Equal Employment Opportunity" (Helen Norton); (13) "The Employment Non-Discrimination Act" (Chai R. Feldbaum and Stephen J. Curran); (14) "Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity" (Arthur A. Baer and Pamela S. Karlan); (15) "Federal Fair Housing Enforcement: The Clinton Administration at Mid-Term" (John P. Relman); (16) "Immigrants and Public Services: Some Principles for Reform" (Wendy Zimmermann); (17) "Federal Action to Confront Hate Crimes: Preventing Violence and Improving Police Responses" (Michael Lieberman); (18) "Access to Justice: Environmental Justice" (Alice L. Brown); (19) "Minority Health Care Issues" (Maya Wiley); (20) "Invisible Women: Uncovering the Health Care Problems Faced by Women of Color" (Jocelyn Frye); (21) "ADA and the Clinton Administration" (Charles D. Goldman); (22) "Another Take on 'ADA and the Clinton Administration'" (Chai R. Feldblum); and (23) "Electronic Redlining: Discrimination in the Information Superhighway" (James J. Halpert and Angela Campbell). (BT)

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New Challenges

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New Challenges

The Civil Rights Record of the Clinton Administration Mid-term

Corrine M. Yu and William L. Taylor, Editors

Report of the Citizens' Commission on Civil Rights

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Dedication

In memory of our colleague Erwin N. Griswold, who devoted so much of his extraordinary career in public service to the struggle for equal justice under law.

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Many people contributed to the creation of this report. Corrine M. Yu, Director and Counsel, worked closely with the authors of the working papers and wrote the Commission's report. William L. Taylor, Vice Chair of the Commission, helped edit the report and provided overall guidance for the project.

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Foreword

The Citizens' Commission on Civil Rights is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity. It was established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

This study has two parts. Part One consists of the Report and Recommendations for the Commission and includes a review of the civil rights record of the Clinton Administration after two years in office. Part Two is a series of working papers prepared by leading civil rights and public interest experts, with some contributions by private practitioners. Several of these authors also contributed to the Commission's earlier studies of federal civil rights enforcement, *New Opportunities: Civil Rights at a Crossroads* (1993), *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term* (1991), and *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989).

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Part One:

Report and Recommendations of the Citizens' Commission on Civil Rights

Chapter I

Introduction

In its 1993 report, *New Opportunities: Civil Rights at a Crossroads*, the Citizens' Commission on Civil Rights wrote that the incoming Clinton Administration faced several challenges in the area of civil rights. By most objective standards, the 1980s were a period of regression in the implementation of laws and court decisions designed to end discrimination in major American institutions. The results of government neglect and retrenchment were made manifest in a variety of ways, including a newly widening gap between the scores of black and white children on achievement tests; continued, or growing, racial disparities in income; pervasive segregation in public schools and housing; and disturbingly high rates of poverty, particularly among the young. We also reported that as the economy lagged and government's concern about civil rights declined, race relations also took a turn for the worse — in places like Miami, Florida, Forsythe County, Georgia, and in Howard Beach and Bensonhurst, New York — culminating in the 1992 disorders in Los Angeles spurred by the acquittal of police officers accused of beating Rodney King. The plight of the minority poor was particularly discouraging: most were locked in racially and economically isolated areas with little opportunity for advancement, as city governments struggled to meet a host of health, social, housing, and educational needs.

What was most distressing was the response of our national leaders to these escalating problems. The position that the Reagan and Bush Administrations took was that America had righted the wrongs of the past, and therefore the affirmative remedies and enforcement machinery that had brought progress in earlier times were no longer needed. The course these Administrations chose was to constrict opportunities and curtail remedies, to foster divisions among Americans rather than to heal them, and to use the machinery of government in ways that encouraged racial and ethnic tensions — leaving the nation's minority population a legacy of continuing oppression and discrimination.

The civil rights news of the 1980s was not all bad. The same kind of bipartisan coalition in Congress that produced the civil rights laws of the 1960s protected them from attack, enacting the Civil Rights Restoration Act of 1988 and the Civil Rights Act of 1991 to reverse the impact of Supreme Court decisions that had narrowed the scope and effectiveness of federal civil rights laws. Congress also adopted more effective remedies for housing discrimination and a comprehensive code of protections against discrimination for disabled people.

But these gains did little to negate the impact of Administration policies of non-enforcement and attacks on civil rights remedies in the federal courts, courts increasingly composed of judges who shared the philosophy of the incumbent Administration. At the same time, new challenges — for example, the need to absorb and provide equal opportunities to a growing immigrant population — arose and went largely unattended.

And so the Citizens' Commission concluded that the election of Bill Clinton as President presented a new opportunity to set a course designed to realize our long-deferred national goal of equality of opportunity. We urged the new President to begin this task by making civil rights a national priority again. What follows is our assessment of how the Clinton Administration, at the midpoint of the 1992 term, has responded to the challenges and opportunities to move the nation forward in the civil rights area. This report also renews our earlier call to the President to redirect the nation's energies from the divisiveness of the last decade, and recommends action that the Executive and Legislative branches should take to frame positive civil rights policies and assure strong enforcement.

Chapter II

Executive Summary and Review

A. The Continuing Legacy of Discrimination

As we observed in our 1993 report, *New Opportunities: Civil Rights at a Crossroads,* the incoming President was inheriting a distressing legacy of unredressed discrimination from his predecessors that undercut their claim that the nation had achieved a blissful state of "colorblindness." This legacy, and the failed policies of the two prior Administrations in the area of civil rights, have been extensively documented in the Commission's three previous reports.

There the Commission identified a number of factors working to deprive the minority poor of opportunities for advancement, including the shift of employment and economic wealth to the suburbs, and the increased migration of middle-class citizens out of cities. We noted that while the growing wealth of suburbs has brought superior educational and other public services often financed without great difficulty out of property and income taxes, for the minority poor in cities, services have declined drastically.

Although statistics show that nationally the suburbs still remain mostly white, with minorities comprising less than 18% of the nationwide suburban population, minorities have joined in the exodus from the cities in significant numbers. According to the 1990 Census, during the previous years the black population in the suburbs grew from 5.9 million to 8 million, a 34.4% increase. During the same period, the Hispanic population in the suburbs rose from 5.1 million to 8.7 million, for an increase of 69.3%. Again during the period 1980–1990, the number of Asians living in the suburbs grew from 1.5 million to 3.5 million, an increase of 125.9%.[1]

Minority suburbanization is a promising trend insofar as it reflects a lowering of discriminatory housing barriers and an increase in the choices available to minority families. But the movement poses challenges as well. To the extent that those involved in the moves are the more affluent minority families, cities will continue to struggle with the fiscal and human consequences of losing middle class residents. At the same time, while moving to the suburbs may represent to some the culmination of the "American Dream," for minority suburbanites the move may not mean an end to inequitable treatment. An analysis of census data from 30 cities and 31 suburbs concluded that property taxes for black homeowners were higher than those for whites with comparable homes in 58% of the suburbs and 30% of the cities.[2] Another study analyzing 840 suburbs nationwide found that taxes for white homeowners were at 82 cents per $100 of assessed value, while taxes for black homeowners were at $1.16 per $100 of assessed value, for a difference of 42%.[3]

This is just one indication that, the claims of the past Administrations to the contrary, impediments to advancement still exist for our nation's minority populations. The chapters that follow appraise the efforts of the Clinton Administration to restore enforcement of the civil rights laws and to reverse these trends.

B. Presidential Leadership in Civil Rights

In its 1993 report, *New Opportunities: Civil Rights at a Crossroads*, the Commission set forth an agenda for change for the new President, and urged him to "reaffirm our national commitment to equal opportunity for all Americans by exercising moral leadership to bring the diverse threads of America together."

President Clinton's early rhetoric indicated that he understood the importance of bringing America together again. In his Inaugural Address, President Clinton stated:

> We must do what America does best: offer more opportunity to all and demand more responsibility from all . . . Today, we do more than celebrate America; we rededicate ourselves to the very idea of America: an idea born in revolution and renewed through two centuries of challenge; an idea tempered by the knowledge that, but for fate, we — the fortunate and the unfortunate — might have been each other; an idea ennobled by the faith that our nation can summon from its myriad diversities the deepest measure of unity; an idea infused with the conviction that America's long heroic journey must go forever upward.

In his State of the Union Address, President Clinton made a specific pledge to civil rights enforcement:

> We must continue to enforce fair lending and fair housing and all civil rights laws, because America will never be complete in its renewal until everyone shares in its bounty.

But determining whether the new President's actions would match his earnest words has proven to be difficult — in large part because the slow pace of presidential appointments created a vacuum within the agencies and departments responsible for civil rights enforcement. As discussed below and in the working papers of Part Two of this report, two years into the Clinton Administration, we are still largely in beginning stages, making difficult a clear assessment of the effectiveness of the Administration in achieving civil rights objectives.

1. Early Actions

In its 1993 report, the Commission called on the new Administration to indicate from its start that civil rights law enforcement would be a high priority in its efforts to foster a more just society. Many of the early actions taken by the President presented hopeful signs that this recommendation would be taken seriously.

For example, Congress passed and the President quickly signed into law civil rights related legislation that had languished under previous administrations. The National Voter Registration Act and the Family and Medical Leave Act (endorsed by the Commission in 1991 and 1993) had been passed by Congress, but vetoed by President Bush, whose vetoes were sustained by narrow margins. Each of these laws is designed to promote equality and fairness. The National Voter Registration Act is intended to eliminate existing barriers to voter registration and otherwise increase electoral participation by, among other things, providing for automatic voter registration when eligible voters obtain a drivers' license. The Family and Medical Leave Act provides job security to workers who must take unpaid leave to care for their families or for their own serious health conditions.

In addition, President Clinton issued Executive Orders that called for increased leadership and coordination in the development and implementation of policies and strategies to address fair housing and environmental justice issues. In January 1994, the President issued Executive Order 12892 (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing), that, among other things, instructs the Secretary of Housing and Urban Development "to take stronger measures to provide leadership and coordination" to enhance fair housing in Federal programs, enlists the cooperation of other Federal agencies in these efforts, including those that deal with mortgage discrimination, and establishes a Fair Housing Council to help coordinate these efforts.

In February 1994, President Clinton issued Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and

Low-Income Populations). This Order, the first Presidential response to growing complaints by minorities that their communities had become environmental dumping grounds, instructed each federal agency to "make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations." The Order provides for the creation of a federal working group on environmental justice to coordinate environmental justice strategies, and directs that group to report to the President regarding the implementation of the Order and the development of such strategies.[4]

2. Early Appointments

Encouraging signs could also be seen in the President's cabinet appointments. During his campaign, candidate Clinton pledged to assemble an administration that "look[ed] like America." With respect to his cabinet and other high-ranking positions, President Clinton has delivered on this promise, pulling together the most diverse group ever of women and minorities to fill these posts.

The President's appointees also scored some early civil rights successes. For example, one of Education Secretary Richard Riley's first actions was to reverse the minority scholarship policy of the Bush Administration, as the Commission had recommended in 1991 and 1993, by declaring that such scholarships, if properly developed, were legal under Title VI of the 1964 Civil Rights Act. As part of his effort to deal expeditiously with a backlog of discrimination and whistleblower cases at the Labor Department, Secretary Robert Reich ruled that Honeywell, Inc. discriminated against women in hiring and promotions during the mid 1970s. Housing and Urban Development Secretary Henry Cisneros and Attorney General Janet Reno appeared before the Senate Committee on Banking, Housing and Urban Affairs to announce that their respective agencies would band together to investigate independent mortgage lenders alleged to have discriminated against minorities. Earlier in the year, Secretary Cisneros had dismissed members of a local public housing authority for allowing black tenants to be harassed and ultimately pushed out of a Texas housing project.

The President's early judicial appointments were also promising. During the first two years of the term, President Clinton made two Supreme Court nominations, 21 to the courts of appeal, and 119 to the district courts. Compared to his two immediate predecessors, whose nominees were overwhelmingly white and male, the President's selections were significantly more diverse and experienced. Of those nominated, more than 21% were African American, approximately 8% were Hispanic, and more than 30% were women, with more than 53% of all nominees having prior experience on the bench.

3. Civil Rights Appointments

Although these actions presented hopeful signs, the Administration failed to move forward expeditiously in several key areas. In particular, the President's slow pace of appointments to key civil rights posts would prove to be damaging to hopes that momentum in civil rights enforcement would be established.

In 1993, the Commission noted that an important barometer of the President's commitment to equal opportunity would be the appointments he made to agencies and offices with civil rights enforcement responsibilities:

> The most visible way for the President to demonstrate his commitment to opportunity for all is by appointing experienced persons committed to vigorous civil rights enforcement and to the implementation of civil rights legislation and court decisions to positions of leadership in agencies responsible for equal opportunity.

Although the Assistant Attorney General for Civil Rights holds the most important civil rights law enforcement post in the federal government, President Clinton did not make a nomination for that position until February 1, 1994. At that time he nominated Deval Patrick, formerly a partner in the

Boston law firm Hill & Barlow. At Hill & Barlow, where approximately one-quarter of his caseload was for *pro bono* clients, Patrick handled a variety of litigation, including the negotiation of a lending discrimination settlement involving a major Massachusetts bank; before that, while at the NAACP Legal Defense and Educational Fund, Patrick worked on a variety of voting rights, death penalty, and lending discrimination cases. The Senate confirmed Patrick's nomination by a unanimous voice vote on March 22, 1994, and the new Assistant Attorney General for Civil Rights was sworn in to office on April 14, 1994.

Patrick's appointment ended the Administration's long and sometimes messy search over the previous 14 months to fill this critical civil rights post. In June 1993, President Clinton, in the face of intense pressure both for and against the nominee, withdrew his nomination of University of Pennsylvania law professor Lani Guinier for the Assistant Attorney General position, stating that he could not agree with or defend some of the views expressed in her legal writings on the Voting Rights Act. In December 1993, D.C. Corporation Counsel John Payton, the apparent frontrunner for the post, withdrew his name from consideration, after disclosures that he had failed to vote or register to vote in recent Washington, D.C. elections.

Patrick's experience and values stand in marked contrast with his two predecessors — William Bradford Reynolds, who zealously promoted a conservative policy agenda and lacked prior civil rights experience, and John Dunne, who had virtually no background in civil rights. At his swearing-in ceremony, Patrick pledged to try to "reclaim the American conscience" and "to restore the great moral imperative that civil rights is finally all about." Indeed, Patrick moved quickly in his early months in office. Following his appointment, the Division entered into a settlement in a public accommodations discrimination lawsuit against a restaurant chain that resulted in $45.7 million in damages; obtained a record-breaking $11 million settlement with a Washington, D.C.-area bank that required the bank to increase the number of new branches, investments, and subsidized loans in black neighborhoods; intervened in the case of an Alabama high school principal who had allegedly barred interracial couples from attending the school prom; and filed an *amicus* brief supporting a New Jersey school board's affirmative action policy geared toward promoting racial diversity among its faculty, thereby reversing the Bush Administration's position, which had challenged the school board's action as unlawful "reverse discrimination."[5]

Nevertheless, without question, the delay in approving a civil rights chief has impeded the Division's ability to enforce the civil rights laws aggressively. Delays in filling important vacancies at the Equal Employment Opportunity Commission (EEOC) have also hindered that agency's progress in civil rights enforcement. Confirmation of the EEOC's new leadership — Chair Gilbert Casellas, Vice-Chair Paul Igasaki, and Commissioner Paul Steven Miller — did not occur until late September 1994, and a General Counsel has yet to be named.

The leadership vacuum at the EEOC has taken a particular toll because of the huge backlog of pending discrimination complaints at the agency. Over the past five years, the number of pending complaints has risen from approximately 44,000 to more than 97,000, while the size of the EEOC staff to handle these complaints has declined significantly. As set forth in detail in the working paper on equal employment opportunity in Part Two of this report, case management continues to be a severe problem for the EEOC, contributing to the agency's failure to meet its enforcement mandate.

Gaps in leadership have also plagued the U.S. Commission on Civil Rights. As discussed in the working paper on the U.S. Commission in Part Two of this report, partisan divisions delayed approvals of President Clinton's Chair and Vice-Chair appointments until November 1993. Several Commissioners then launched a legal challenge to the President's authority to appoint an acting staff director without the concurrence of a majority of the Commission. That challenge was upheld by a U.S. district court, leaving a critical vacancy at the staff director's position that was not filled until May 1994.

As our authors observe in Part Two of this report, the impact of the Clinton Administration's delay in appointments has manifested itself in several ways. Many important policy decisions were deferred until leaders at the enforcement agencies were put into place. In addition, upon assuming office, those leaders were faced with a full slate of issues with which to contend, and a limited window of time within which to deal with them.

Perhaps most frustrating of all has been the fact that the White House itself has failed to provide clear direction with respect to civil rights policy. Indeed, there is no one at the White House with designated civil rights responsibility, often leaving agency civil rights chiefs in a quandary when Administration guidance is needed on important issues.

C. Civil Rights Policy and Enforcement in the Clinton Administration

In its 1993 report, the Commission noted that the tone the President set for his appointees was as important as the appointments themselves. We urged the new President "to make clear to his appointees that civil rights statutes, regulations, and remedies sanctioned by the courts should be rigorously enforced." The working papers of civil rights experts and private practitioners in Part Two of this report discuss the Clinton Administration's current policy and law enforcement efforts in the areas of education, employment, voting, housing, immigration, hate crimes, environmental justice, health, rights of persons with disabilities, and the information superhighway. This section summarizes their assessments of the Clinton Administration's civil rights enforcement efforts.

1. Education

(a) Elementary and Secondary Education

The Clinton Administration's record to date in civil rights enforcement in elementary and secondary education is a sharp contrast to the records of the last two Administrations.

At the Department of Education's Office of Civil Rights, enforcement efforts include an investigation into, and finding of, sexual harassment at a Minnesota elementary school; an investigation of discriminatory student grouping in a Richmond, Virginia school district; an investigation into an Oakland, California school district's Limited English Proficiency (LEP) program's compliance with Title VI that culminated in the threatened withholding of federal funding if compliance was not achieved; investigations of the LEP programs of an Oklahoma school district and two Texas school districts; an investigation and settlement of a complaint on the discriminatory impact of graduation exams administered by Ohio school districts; and several investigations involving disabled students' rights to educational services.

In addition, OCR recently issued new guidelines for government review of racial incidents, racial harassment, and hostile racial environment at education institutions, including public elementary and secondary schools. These guidelines, by describing how OCR will handle such issues, provide an impetus to public school officials to monitor discriminatory activity by or toward students.

The major education issue still to be considered by the Justice Department and OCR is school desegregation. Specifically, both agencies need to determine not only how to address the many hundreds of still-open school desegregation cases that lay dormant during the Reagan and Bush eras, but whether and where to bring new lawsuits. In November 1994, the Justice Department took an important first step when it announced that it would file a friend-of-the-court brief in support of the position of plaintiffs in *State of Missouri v. Jenkins*, a Kansas City school desegregation case under review by the Supreme Court. The principal issue in that case is under what circumstances a state may terminate its contribution to educational improvement programs ordered by a court to redress the educational deficits of minority children that have been caused by unlawful school segregation. The State of Missouri argues that the State fulfills its obligations simply by contributing funds pursuant to a court order for a specified period of time. It has appealed a Court of Appeals decision holding that evidence concerning student performance should be considered to determine whether the educational deficits are in fact being eliminated.

(b) Minority Access to Higher Education

The Clinton Administration's record regarding minority access to higher education reflects its ambivalence in this area. The Administration's approach to funding for higher education is one example of the type of mixed message being sent. On the one hand, the Administration has recommended increases in funding for programs that benefit minority students, including fellowships and scholarships for disadvantaged students, and aid to historically black colleges and universities and Hispanic-serving institutions. On the other hand, the Administration has made some recommendations that will ultimately restrict minority access to higher education, such as proposals to cut, freeze, or eliminate funding for certain graduate fellowships and grants for disadvantaged students, women, and minorities.

In another significant development, the Clinton Administration launched a National Service Program under which, in exchange for volunteering for social service agencies and the homeless, young people would receive wages, benefits, and most importantly, grants to attend colleges for two years or to pay off college debts already accrued. But the program's modest scope means that it will affect relatively few students — initially 20,000, which is projected to grow to 100,000 by 1997 — compared to the 14 million students currently in higher education. As a result, the ability of national service to significantly relieve student debt is quite limited.

Many of the Clinton Administration's appointments to the Department of Education have been applauded by the higher education community. However, these officials have inherited a full plate of issues to contend with in a fairly short time, including direct student loans, minority scholarships, revised guidance on internal procedures for the Department, higher education desegregation, fairness of standardized tests, and other vestiges of 12 years of civil rights non-enforcement.

With respect to one of these issues — minority scholarships — the Clinton Administration acted quickly to reverse the policy of the Bush Administration, much to the relief of the higher education community. In early December 1990, then-Assistant Secretary for Civil Rights Michael Williams announced that scholarships based on race constituted illegal discrimination under Title VI of the 1964 Civil Rights Act. The Education Department temporarily withdrew this highly criticized policy, but then issued for comment a proposed Policy Guidance declaring that minority scholarships were illegal under Title VI unless race-exclusive scholarships were necessary to overcome past discrimination. No final Policy Guidance was issued before the change in administrations. In February 1994, Education Secretary Riley announced that the Department had completed its review of the minority scholarship policy and had concluded that financial aid awards could be made to remedy past discrimination and to create campus diversity without violating Title VI.

However, an ominous precedent concerning race-based scholarships is contained in the Fourth Circuit's recent decision in *Podberesky v. Kirwan, et al.*, which involves a challenge to the University of Maryland's merit scholarship program established for black students, by a Hispanic student denied a scholarship under the University's program. The Court of Appeals found error in the district court's determinations that (a) the University of Maryland had presented sufficient evidence of current effects of past discrimination against black students to justify the scholarship program, and (b) the program was narrowly tailored to serve its stated purposes. The appellate court reversed the district court's grant of summary judgment to the University and awarded judgment to plaintiff. The University is appealing the decision. If the decision stands, it will call into question the continued effectiveness of minority scholarships on college campuses.

(c) Title IX

Among the civil rights statutes that the Department of Education's Office of Civil Rights (OCR) is charged with enforcing is Title IX of the Education Amendments of 1972, whose mandate is gender equity in education. In the area of gender equity, the Clinton Administration is moving away from past enforcement strategies, which focused primarily on athletics and pregnancy, and is moving toward targeting a wider array of issues, such as underrepresentation of girls in high track courses, biases in testing, and sexual harassment. Most of OCR's activity in these areas has occurred in the context of compliance reviews and policy guidance.

At OCR, signs of stepped-up civil rights activity include the development of a policy guidance on sexual harassment; the development of methods of ensuring that testing improves (rather than limits, as has been the case) access to education for girls and women; participation in the negotiation of a case filed by provate parties concerning gender bias in the PSAT; the updating of OCR's college athletics investigations manual; and the iniatiation of a compliance review focusing on girls' participation in high track courses. Significantly, OCR has sought guidance from civil rights groups, women's groups and educators in connection with many of these activities.

These are certainly positive steps. Yet the Administation could send an even more powerful message concerning its commitment to gender equity by being more proactive in its enforcement of Title IX, either through the defunding process available to OCR, or by referring matters to the Justice Department for litigation.

2. Employment

Two years into the term, the Clinton Administration has produced a mixed record in the area of employment rights. Positive developments include the enactment of key legislative initiatives geared toward ensuring equal employment opportunity for all, such as the Family and Medical Leave Act and the expansion of the "rape shield rule" (which had previously applied only to bar admission of evidence of the alleged victim's prior sexual behavior in federal criminal sexual assault cases) to all federal criminal *and* civil cases, including sexual harassment cases. Moreover, many of the Administration's appointments to key civil rights posts have shown the value of committed and expert leadership.

Among the gains over the last two years have been improvements in the EEOC's interpretation of the laws it enforces. The agency published new internal enforcement guidelines on the application of the Civil Rights Act of 1991 to seniority systems, to U.S. workers employed by American employers overseas, and to foreign employers doing business in the United States. The EEOC also sought to reverse the Bush Administration's position against retroactive application of the damage and jury trial provisions of the Civil Rights Act of 1991, although the Supreme Court subsequently ruled against retroactivity. The EEOC's effort to promulgate guidelines on harassment in the workplace were stymied when the religious right objected to provisions dealing with religious harassment and the resulting outcry in Congress impelled the agency to withdraw the guidelines for further consideration.

At the Department of Justice, federal equal employment opportunity law is once again being enforced. Thus, for example, during the past two years, the Department has urged the Supreme Court to support the rights of victims of employment discrimination in *Harris v. Forklift Systems* (where the Court held that sexual harassment victims need not prove psychological damage before asserting their right to a harassment-free workplace); in *Landgraf v. USI Film Products* and *Rivers v. Roadway Express* (where the Court, disagreeing with the Clinton Administration and civil rights advocates, held that certain provisions of the 1991 Civil Rights Act did not apply retroactively); in *Garcia v. Spun Steak* (where the Court, despite arguments by the Clinton Administration and civil rights advocates that "English-only" workplace rules constitute illegal Title VII discrimination, denied review of a decision adverse to the complaining party); and in *McKennon v. Nashville Banner Company* (where the Court will determine whether employers can avoid liability for unlawful discrimination based on evidence of an employee's misconduct discovered after the discriminatory employment decision). The Department also expressed support for such significant civil rights legislation as the Equal Remedies Act and the

Justice for Wards Cove Workers Act.

The Department has also expressed support for a critical tool — affirmative action — in *United States v. Board of Education of the Township of Piscataway*, a lawsuit involving an affirmative action policy designed to ensure faculty diversity. The Clinton Administration has filed a friend -f-the-court brief in *Piscataway*, arguing that the defendant school board did not violate Title VII, when, faced with the need to lay off one of two business education teachers with identical seniority and qualifications, it retained, pursuant to the affirmative action policy, the only black teacher in the department. The government's current position represents a reversal of the stance taken by the Bush Administration, which had originally sued the school board, challenging the termination as illegal "reverse discrimination."

The Office of Federal Contract Compliance, under the leadership of Deputy Assistant Secretary Shirley Wilcher, has developed a model enforcement agenda that includes such critical strategies as targeting enforcement efforts, developing and using the full range of available sanctions for noncompliance, and expediting enforcement of conciliation agreements where there are breaches by contractors. In addition, the OFCCP has embarked on regional programs designed to enhance the agency's effectiveness, such as the use of "testers" to identify discrimination by contractors, and has begun the long-overdue process of updating and revising Executive Order regulations.

Despite these positive developments, the record in many areas remains bleaker than might otherwise be expected. Of particular concern is the enforcement record at the EEOC, where, for example, Equal Pay Act litigation is virtually non-existent; the number of class action suits has plummeted; and the case settlement rate has decreased by more than 50%, while the dismissal rate has nearly doubled. The EEOC's huge backlog of complaints (which stands at approximately 97,000, with average complaint processing time of nearly 11 months, up from the 1980 average of three to six and one half months) and the quality of its intake and investigation also remain problematic for the agency. Compounding these problems are the shrinking resources — in terms of both funding and personnel — that have undermined the ability of the EEOC and other agencies to fulfill their enforcement mandate.

3. Voting

Two years into the 1992 term, the Clinton Administration faces critical questions concerning voting rights and equal electoral opportunity.

On the one hand, significant voting rights gains have been made on the legislative front. For example, the expansion of Section 203 of the Voting Rights Act means that bilingual assistance and materials will be required in many jurisdictions. In addition, the passage of the National Voter Registration Act should result in stepped-up efforts to increase voter registration and to ensure that registration systems are enforced in a nondiscriminatory manner.

Despite these positive developments, however, the Department of Justice faces a number of challenges for the remainder of the 1992 term. Most significantly, judicial hostility to the goals of the Voting Rights Act has forced the Civil Rights Division to take a defensive posture to preserve hard won gains. For example, the Supreme Court's decision in *Shaw v. Reno*, which upheld the right of five white plaintiffs to challenge North Carolina' s redistricting plan as unconstitutional, has spawned numerous lawsuits in which congressional districts designed to increase minority influence have been struck down as racial gerrymandering. Although the Civil Rights Division appears committed to aggressive affirmative enforcement of the voting rights laws, it is likely that the need to divert precious resources to defending minority opportunity districts against *Shaw v. Reno*-type challenges will continue.

Another Supreme Court decision, *Holder v. Hall*, which held that minority plaintiffs could not maintain a challenge under Section 2 of the Voting Rights Act to the size of a governing authority, may also prompt increased litigation in the form of challenges to Justice Department preclearance decisions. The Justice Department will need to vigorously defend challenges to its Section 5 preclearance objections, as well as aggressively monitor those jurisdictions where a Section 5 objection has been interposed.

In *Presley v. Etowah County Commission*, the Supreme Court rejected the argument that the Voting Rights Act applies to changes of authority within elected bodies, even though such changes might strip officials elected by minority voters of the legislative powers of their offices. The Justice Department has announced its support for a legislative override of the *Presley* decision, and in the interim, has attempted to limit the decision's application.

Furthermore, several lower court decisions have eroded the vitality of the Voting Rights Act in other ways, by, for example, limiting the reach of the Act's bilingual provisions.

Other issues that the Department of Justice will need to consider are (a) the merits of the argument (often raised by defendants in redistricting cases) that Latino or other language minority plaintiffs need to demonstrate they are a majority of the citizenship voting age population in a district to establish Section 2 liability; and (b) ensuring full compliance with Section 203 so that English-only election barriers do not deny limited-English proficient citizens their right to vote.

4. Housing

The Clinton Administration has made impressive strides thus far in the area of federal fair housing enforcement. Critical to that success have been the commitment and support shown not only by the Attorney General and the Secretary of HUD, but by the President himself, who early on in the term signed an Executive Order expressly calling for stronger measures in the area of fair housing.

At HUD, Secretary Cisneros and Assistant Secretary Achtenberg have begun the much needed process of reorganizing the Office of Fair Housing and Equal Opportunity to facilitate more effective complaint processing and investigation. Encouraging signs at the agency include: (a) an increase of nearly 10% in reasonable cause findings, as a percentage of total merits determinations made by the agency; (b) a decrease of 17% in administrative closures; and (c) damage awards by HUD administrative law judges that have set new HUD agency records in nearly all areas.

HUD has also begun drafting regulations in the areas of lending and homeowners' insurance discrimination that will address, among other things, prohibited practices, evidentiary burdens, and available remedies for discriminatory conduct.

Finally, in a welcome change from the Reagan and Bush Administrations, the Secretary of HUD has reaffirmed the applicability of disparate impact theory under the Fair Housing Act, requiring justification for practices by developers, landlords, lenders and others that have an adverse impact on minority home seekers.

Significant inroads have also been made at the Department of Justice. For example, in the last year, the Housing Section filed and settled four substantial pattern or practice mortgage lending discrimination cases, including a record setting $11 million settlement with Chevy Chase Federal Savings Bank. Five of the 16 new pattern or practice fair housing cases filed by the Department have already generated more than $1 million in compensatory damages.

Positive policy developments at the Justice Department also include the reaffirmation, as at HUD, of the Department's commitment to apply disparate impact theory under the Fair Housing Act, and, in a reversal from the Bush Administration's position on group home litigation, renewed commitment to prosecute cases involving discrimination against disabled group home program participants.

On the other hand, HUD continues to suffer from a backlog of complaints over 100 days old, and efficiency in complaint processing by regional offices continues to be spotty. Moreover, the number of Secretary-initiated complaints is still relatively low. At the Justice Department, the Housing Section continues to struggle with a rapidly increasing docket of cases brought by complainants who have elected to prosecute their case in federal court, rather than before a HUD administrative law judge ("election" cases). This rising tide of election cases threatens the initiation of new "pattern or practice" cases investigated. In addition, median compensatory damage awards in election cases have generally remained low.

It is too soon to tell whether many of the efforts of HUD and the Department of Justice to improve federal fair housing enforcement (such as the reorganization of the Office of Fair Housing and Equal Opportunity) will prove to be successful in the long run, but at this point, HUD and the Department deserve much credit.

5. Immigration

Over the past decade there has been a substantial increase in the number of immigrants to the United States. Their needs for public services have come at a time of economic stringency in Federal and state budgets. As a result, public debate has arisen about the current system of immigrant eligibility for various government benefits. While the most publicized issues concern efforts to deny services to illegal immigrants, legal immigrants are affected as well.

Many of the reform proposals have taken the form of Federal and state legislative initiatives to change the nation's welfare and social service system. The Clinton Administration introduced a proposal in the 103rd Congress, the Work and Responsibility Act of 1994, which increases the period during which a sponsor's income is deemed available to an immigrant from three to five years. After the first five years of residence, immigrants with sponsors who have annual family incomes above the U.S. median would be ineligible for benefits until the immigrant attains citizenship.

The Clinton Administration's proposal is the least restrictive of the major proposals that have been introduced. For example, the House Democratic Mainstream Forum's proposal (H.R. 4414) would bar immigrants lawfully present in the United States from receiving Aid to Families with Dependent Children, Supplemental Security Income, food stamps, and Medicaid. The most restrictive reform proposal in this area is the Republican initiative now embodied in the Republican "Contract with America," which would deny legal immigrants access to 60 federal assistance programs.

The proposals to restrict legal immigrants' access to federal benefits raise a host of issues for which there are no easy answers, including the degree of cost-shifting to states and localities; the extent to which the proposals inhibit immigrants' ability to integrate into society; the role of the family or sponsor in supporting the immigrant; and the extent to which legal immigrants should be broadly eligible for benefits on the same basis as citizens.

As to illegal immigrants, a recently enacted state measure, California's Proposition 187 (which denies public education, non-emergency health care, and social services to undocumented immigrants), raises questions concerning the constitutional ability of states to deny benefits to persons in the United States, legal or illegal, in light of the Supreme Court's holding in *Plyler v. Doe* that denial of public education benefits is unlawful. In addition, Proposition 187 raises questions about the desirability and efficacy of making teachers and other social service providers the enforcers of immigration law.

6. Hate Crimes

Hate crimes are criminal acts where an individual is targeted because of his or her personal status or characteristics. These types of crimes can have an impact beyond the physical or economic injury to the targeted victim, because of their potential to exacerbate racial, ethnic, or religious tensions between or among groups.

State and federal responses to hate crimes have been hampered by a lack of comprehensive data that would reveal, for example, the number, location and types of hate crime incidents. To date, only 19 states and several police departments have established systematic hate crime data collection procedures.

On the federal front, the Hate Crime Statistics Act (HCSA), enacted in 1990, requires the Department of Justice to collect data and publish an annual survey regarding crimes that "manifest prejudice based on race, religion, sexual orientation, or ethnicity" (disability-related crimes were added pursuant to this year's omnibus crime bill). The FBI's data gathered pursuant to the HCSA thus far presents the following picture: for 1991, approximately 4,500 hate crimes, reported from almost 2,800 police departments in 32 states; for 1992, approximately 7,400 hate crimes, reported from about 6,000 agencies; and for 1993, approximately 7,600 hate crimes, reported from more than 6,800 agencies in 46 states and the District of Columbia. The HCSA data also reveal that more than 60% of the almost 20,000 reported hate crimes were race-based; about 36% of the reported crimes were anti-black, and 20% of the reported crimes were anti-white. Seventy percent of the offenses reported were crimes against persons.

Currently, 47 states and the District of Columbia have enacted some type of hate crime statute. Challenges to these laws have generally been based on claims that they are overbroad and infringe on First Amendment rights. In *R.A.V. v. St. Paul*, the Supreme Court sustained a constitutional challenge to an ordinance that had been used to charge a teenager who had burned a cross on the lawn of a black family. The Justices were divided as to why; some argued that the ordinance constituted "content discrimination," while others would have struck the ordinance down because it could be applied to punish protected expression as well as criminal conduct.

Many of these statutes provide for penalty enhancement for crimes where the victim is selected because of his/her personal characteristics. In addition, in September 1994, Congress enacted a hate crime penalty enhancement statute as part of the omnibus crime bill, which would increase the penalties for federal crimes where the victim was targeted "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability ,or sexual orientation of any person." The Supreme Court did not address the penalty enhancement approach in *R.A.V.*, but considered the issue last term in another case, *Wisconsin v. Mitchell*, where it upheld Wisconsin's penalty enhancement statute.

7. Environmental Justice

Recognizing the well-documented proposition that minority and disadvantaged communities are disproportionately affected by environmental hazards and pollution, the environmental justice movement has facilitated new alliances between civil rights organizations and environmental groups. Through grassroots techniques and legal challenges, leaders of the environmental justice movement argue that discriminatory policies and practices lead to the placement of a disproportionate number of polluting facilities in minority and poor communities, and that these discriminatory siting decisions constitute civil rights violations.

The Clinton Administration has taken several steps at the very highest levels that demonstrate it considers environmental justice to be a serious issue. For example, the Environmental Protection Agency's (EPA) Administrator, Carol Browner, early on listed environmental justice as a priority for the EPA. Moreover, as discussed earlier in this report, in February 1994, the President signed an Executive Order creating an interagency working group whose mandate is to assist in coordinating research and data collection on environmental justice issues among designated agencies, with the ultimate goal of developing a coordinated environmental justice strategy.

These early signals are encouraging, but there is still much to be done in the environmental justice area. The Clinton Administration will need to develop a strategy to deal with the environmental burdens being placed on minority and low-income communities. Environmental justice advocates have turned with increasing frequency to a strategy that calls for more aggressive enforcement of Title VI of the Civil Rights Act of 1964 (which prohibits federal funding recipients from discriminating on the basis of race, color, or national origin) by EPA and other agencies and departments that fund environmental programs. These litigants seek to compel the EPA either to terminate funding to federal assistance recipients that discriminate or to make sure those recipients comply with the EPA's nondiscrimination regulations promulgated under Title VI. It remains to be seen whether EPA will, on its own initiative, develop its own Title VI enforcement program to help further the goal of environmental justice.

8. Health

The Clinton Administration has demonstrated greater concern for the health of Americans (and particularly minority Americans) than previous Administrations, as shown by, among other things, its attempt to establish a right to health care through Federal reform legislation. This Administration, which inherited an Office of Civil Rights at the Department of Health and Human Services that was without direction and largely ineffective, has undertaken a number of activities benefitting minorities.

For example, the OCR has handled matters involving the segregation of hospital wards at a New York hospital, and the referral by a Florida hospital of minority pregnant drug addicts for criminal prosecutions. The Clinton Administration has also taken steps to re-examine the need for bilingual communication services in health facilities, an issue that languished under the Reagan and Bush Administrations. Moreover, OCR has examined the possibility of cross-referencing existing databases to secure data from recipients of HHS funds that provides the race or national origin of patients treated by particular providers.

Nevertheless, significant problems remain. What is still needed, for example, is a data collection system that will ensure effective enforcement of Title VI of the 1964 Civil Rights Act, which prohibits discrimination by federal funding recipients on the basis of race, color or national origin. While OCR has made a good faith effort to collect race-based data, that effort will not yield data on race-based utilization of federally funded health services by non-Medicaid recipients, nor will it contain useful information for all racial groups. The Administration has refused to alter the applicable health care provider billing form (known as the UB-92), and has no plan to collect data on utilization of funded programs by non-Medicaid or Medicare patients.

Moreover, questions still remain about the OCR's complaint review process, which continues to be slow and unreliable. As just one example, the OCR has yet to rule on a case filed in April 1991, that challenged as racially discriminatory a New York City hospital's decision to close all maternal and child care services at its Harlem facility and instead provide those services at its midtown Manhattan facility.

The Medicare Act waiver process also raises important issues for minorities, because if granted, the state systems they permit may greatly alter the way that Medicaid services are delivered. However, the Health Care Financing Administration has not reviewed any state waiver request for its impact on minorities or other civil rights implications. Consequently, the current waiver process has resulted in requests that create mandatory managed care programs for low-income people that have no federal requirements for the provision of care to Medicaid and low-income patients.

In sum, while the Clinton Administration has exhibited a commitment to ensuring the health of minority Americans, there are many important steps that it has not taken or has not completed.

9. Rights of Persons with Disabilities

Two years into the 1992 term, the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), the two key agencies empowered to enforce the Americans with Disabilities Act (ADA), have faced a full plate of ADA-related issues.

As discussed in the working paper on equal employment opportunity, the EEOC has reported that its backlog of complaints has risen to an all-time high of more than 97,000. Chairman Casellas has attributed the backlog primarily to increased responsibility — e.g., the implementation of the ADA — without a corresponding increase in resources. Since the implementation of the employment provisions of the ADA, the number of job bias cases filed with the EEOC has risen more than 100%.[6]

Nevertheless, the EEOC has achieved some high profile successes. In March 1993, a federal jury returned a $572,000 verdict in the first ADA lawsuit brought by the EEOC. In that case, the jury concurred with the EEOC's claim that the defendant employer had unlawfully discriminated in terminating an employee with brain cancer. Other ADA lawsuits brought by the EEOC include a case based on an employer's discharge of an employee upon his return from disability leave after undergoing back surgery; a suit brought against a fund that imposed a $5000 lifetime cap on AIDS-related expenses even though persons with other catastrophic illnesses were entitled to a $300,000 lifetime cap; and a claim against a health insurance fund that eliminated medical coverage for AIDS.[7]

The Department of Justice filed its first Title I disability lawsuit in December 1993. In that case, the Department sued the state of Illinois for denying pension and retirement benefits to police officers and firefighters with disabilities.[8] In January 1993, the Department obtained its first civil penalty under the ADA, in a settlement with a Denver parking lot and garage company that failed to provide accessible parking.[9] In addition, the Justice Department has entered into other high profile settlements, including an agreement with the largest provider of accounting refresher courses that sign language interpreters and other aids would be provided to students who required them; and an agreement with the nation's second largest rental car company to provide the disabled with specially equipped automobiles at its facilities.[10]

It is too soon to tell whether the Clinton Administration will live up to its campaign pledge of aggressive ADA enforcement. Hampering its efforts, however, are the problems of the enforcement agencies (e.g., huge backlog of complaints, lack of funding, insufficient use of alternative dispute mechanisms) that have been identified elsewhere in this report.

10. Information Superhighway

The development of the nationwide communications system known as the National Information Infrastructure (NII), more commonly referred to as the "Information Superhighway," has given rise to a new form of discrimination known as "electronic redlining." Electronic redlining, like redlining in the mortgage lending and insurance industries, occurs when a common carrier refuses to invest in a particular (usually minority and low-income) neighborhood, thus denying that community the benefits conferred by advanced telecommunications services.

These benefits have the potential to be quite significant. Among the areas in which the NII is expected to play an important role are education (by enabling schools and colleges to share and originate educational programming); health care (by permitting doctors to screen patients by video conference and to advise other doctors in more remote locations about treatments and diagnosis); economic development (by allowing businesses to communicate quickly and efficiently with suppliers and customers); and voting (by permitting voters to register from home, review campaign literature, communicate with elected officials and participate in public hearings). As advanced telecommunication methods become more pervasive, communities denied such services will find themselves to be at a distinct disadvantage.

The Clinton Administration has committed itself to a policy of making the NII available to all Americans. Nevertheless, adopting redlining protections has not been a high legislative priority for the Administration. Given the possibility for delay with respect to Congressional action on telecommunications reform legislation, it is up the Administration, and specifically the Federal Communications Commission, to take a more assertive role in crafting meaningful redlining safeguards.

D. Conclusion

In many respects, the Clinton Administration has made a good beginning in its efforts to restore federal civil rights performance.

The President has rearticulated the national commitment to combat discriminatory practices and to provide equal opportunity for all persons. He has appointed to the cabinet and to the chief civil rights positions in government able and experienced people who are dedicated to enforcing the law. Almost all of the Administration's nominees to the federal bench have been people with a demonstrated commitment to equal justice under law, among them many minorities and women.

Some of the Administration's early enforcement actions, such as those dealing with the racially discriminatory practices of a major restaurant chain and mortgage discrimination by lending institutions have begun to pay practical dividends. Legislative victories have been won on efforts to increase access to voting and improve the conditions of women in the workplace. And the voice of the Solicitor General has again been heard in the Supreme Court, arguing on behalf of the rights of children to equal protection of the laws.

Accordingly, for the first time in more than a decade, people who encounter bigotry have reason to believe that government will be their ally, not their foe, in seeking to overcome it.

But government is still very much in the beginning stages in revitalizing civil rights enforcement and in developing new policies to meet the needs of the 1990s. For various reasons — including indecision, a reluctance to stand behind nominees whose views generated controversy and a desire to create balanced racial and ethnic tickets at some agencies — the Administration has been very slow in staffing key civil rights positions. As one result, the Equal Employment Opportunity Commission, a key agency in combatting job discrimination, has remained in disarray for almost two years.

Nor is it clear how the Administration will respond to the new and often formidable challenges of the 90s. Although Secretary Cisneros of HUD has spoken eloquently for housing choice, the Administration has yet to formulate or articulate a comprehensive policy to provide opportunity to persons who remain trapped in poverty and discrimination in cities throughout the land, a policy that would include, but not be limited to, civil rights enforcement. Hence, the debate has focused almost exclusively on dealing with the pathology that results from stunted opportunities, rather than on what needs to be done to create opportunities in the first place.

Similarly, the Administration has yet to confront the tensions that have risen over increased immigration, both legal and illegal. While the strength of the nation has always resided in its diversity, dwindling economic opportunities have set one group against another.

Finally, there is the challenge posed by the changes resulting from the 1994 elections. The gains that have been made over the past three decades have been made possible only because Republicans and Democrats stood together in Congress and elsewhere. But it is by no means certain that there remains a cadre of Republicans in the new Congressional leadership that is committed to continued progress in extending equality of opportunity. Some Congressional committee chairs may use their oversight authority to deter the use of affirmative civil rights remedies by federal agencies. Other threats to civil rights may come more indirectly, in the form of cutbacks in the collection of racial data, and in curtailing education, job training and social service funds needed for the effective exercise of civil rights.

Accordingly, there are new challenges not just for the Administration, but for Congress and the American people. All are faced with basic decisions about the direction the nation should take: forward to enable people to reach their full potential to become contributing members of society, or backward to an era of discrimination and neglect. How the issues of equal opportunity and fair treatment posed in this report are dealt with may help to determine that direction.

Endnotes

[1] Karen De Witt, *Wave of Suburban Growth is Being Fed by Minorities*, THE NEW YORK TIMES, August 15, 1994.

[2] Diana Jean Schemo, *Suburban Taxes are Higher for Blacks, Analysis Shows*, THE NEW YORK TIMES, August 17, 1994.

[3] *Id.*

[4] Another early civil rights initiative involved the military's ban on homosexuals serving in the armed forces. Although candidate Clinton had urged a lifting of the ban, ultimately, the changes that were adopted — the so-called "Don't Ask, Don't Tell" policy — proved to be modest, due in large part to the Administration's failure to muster support for major changes from military and Congressional leaders.

[5] *See, e.g.*, Catherine Yang, *Quiet Crackdown*, BUSINESS WEEK, September 26, 1994 at 52; Pierre Thomas, *Deval Patrick and the "Great Moral Imperative"*, WASHINGTON Post, October 26, 1994 at A1; W. John Moore, *Collision Course*, NATIONAL JOURNAL, December 3, 1994 at 2831.

[6] Ann Grimes, *Reinvigorating the Fight against Discrimination*, WASHINGTON POST, October 4, 1994.

[7] *ADA Compliance Update from the EEOC*, DISABILITY RIGHTS (Education and Defense Fund News, Berkeley News, Berkeley, CA,) September 1994, at 7.

[8] *Justice Department Sues Illinois in First Employment Disability Discrimination Case*, U.S. DEPARTMENT OF JUSTICE, December 28, 1993.

[9] *Justice Department Obtains First Civil Penalty under Americans with Disabilities Act*, U.S. DEPARTMENT OF JUSTICE, January 6, 1993.

[10] W. John Moore, *Collision Course*, NATIONAL JOURNAL, December 3, 1994, at 2831.

Chapter III

Recommendations

Introduction

In the wake of the 1994 elections, the American people face anew an old question — do we believe in affirmative government?

The question goes back to the earliest days of the republic. The concerns about oppressive government that gave rise to the founding of the republic found expression in a Bill of Rights that limited the authority of government and in the view "that government is best which governs least." Yet Americans expected their government to accomplish positive aims as well. Thus, the Constitution spoke in broad affirmative terms about the establishment of justice, ensuring domestic tranquility, and promoting the general welfare.

Throughout our history, the American dream of opportunity has been advanced by affirmative acts of government. In the 19th century, the Homestead Act opened the West to settlement and ownership of property. The Morrill Acts established land grant colleges and helped make higher education more widely available in this country than anywhere else in the world.

In the 20th century, federal measures adopted to combat the Depression ultimately led to income security for millions of Americans and to the opportunity for families to own their own homes in the suburbs. In the aftermath of World War II, the GI bill opened education and employment opportunities to a new generation of Americans.

In the last half of this century, there has been no greater expression of the utility of affirmative government than the civil rights revolution. Initially, the prime effort was to throw off the yoke of oppressive state systems of racial segregation. But it soon became apparent that equal opportunity would not be achieved simply by terminating long entrenched discriminatory practices if nothing was done to deal with their effects and vestiges. Only when affirmative remedies for discrimination were developed were people empowered to secure new opportunities and change their own lives for the better. These affirmative remedies included not simply those embodied in civil rights laws or court decrees but in social and economic initiatives such as Head Start, Title I, job training programs, and housing subsidies for persons of low and moderate income.

Not all of these efforts were successful, of course, and as well-intentioned efforts faltered, and incumbent Administrations and Congress seemed increasingly enmeshed in responding to monied or special interests, confidence in government waned. In 1981, Ronald Reagan could strike a responsive chord by saying, on assuming the most powerful office in the world, "Government is not the solution to our problem ... government is the problem."

In 1994, that note has been sounded again. But it would be a mistake to believe that the nation has rejected affirmative government. In a recent *New York Times*/CBS News poll, two-thirds of the respondents said that "Government has a responsibility to take care of the poor." While "welfare" programs were unpopular with the respondents, a plurality thought that "programs for poor children should be increased" and only a handful wanted them decreased.[1]

The members of this Commission, Democrats, Republicans, and independents alike, believe in affirmative government. We agree that there is a great deal of room for discussion about the means by which the legitimate ends of government should be accomplished. But about the ends themselves — the establishment of justice, the promotion of the general welfare — there should be no dispute. If those objectives were to be discarded, we would live in a very different nation — one in which the hopes of people for economic advancement and better lives would be dampened while tensions and conflicts among groups increased.

It is with this animating belief in the ability of government to serve its people well that the Commission offers recommendations designed to make tangible the promise of equal opportunity.

Presidential Leadership and Appointments

1. **Reaffirm National Commitment to Equal Opportunity**
   We recommend that the President reaffirm our national commitment to equal opportunity for all Americans by exercising moral leadership to bring the diverse threads of America together.

In our 1993 report, we urged the new President to help re-establish a national consensus that every American should be given the opportunity to succeed. Two years later, we renew our recommendation. Although the President has taken important steps in this direction, it is still not clear that assuring equality of opportunity for all persons is among the highest priorities of his Administration. Strong enforcement of civil rights laws and court decisions and support for the enactment of other legislation are essential to provide access to equal opportunity.

2. **Support Efforts of Civil Rights Working Group**
   We recommend that the President make support for the efforts of the recently created Civil Rights Working Group a high priority for his Administration.

In our previous reports, the Commission has urged the President to establish an inter-agency, Cabinet-level task force to address immediately the problems of inter-group tensions and conflicts, and to develop and submit to him within 60 days a coordinated action plan for dealing with the causes and consequences of these conflicts. We recommended further that this task force include representatives from the Executive Office of the President, the heads of all Departments, as well as representatives from the U.S. Civil Rights Commission and the Equal Employment Opportunity Commission (EEOC).

The Administration has now addressed one part of this recommendation. By Memorandum to the Heads of Executive Departments and Agencies dated August 8, 1994, the President established a Civil Rights Working Group, whose mission is to "identify barriers to equal access, impediments to effective enforcement of the law, and effective strategies to promote tolerance and understanding in our communities and workplaces" and to otherwise "evaluate and improve the effectiveness of Federal civil rights enforcement missions and policies." The co-chairs of the Working Group are the Attorney General and the Director of the Office of Management and Budget, with the following Administrative officials serving as members: Secretary of the Treasury, Secretary of Commerce, Secretary of Agriculture, Secretary of the Interior, Secretary of Education, Secretary of HHS, Secretary of HUD, Secretary of Labor, Secretary of Transportation, Secretary of Veterans Affairs, Administrator of EPA, Chair of the EEOC, Assistant to the President for Economic Policy, Assistant to the President for Domestic Policy, and the Assistant to the President and Director of Public Liaison. The President also invited the Chairperson of the U.S. Commission on Civil Rights to participate on an informal basis, as well as encouraged all Cabinet officers and agency heads to participate.

The President directs the Working Group to "advise appropriate Administration officials and me on how we might modify Federal laws and policies to strengthen protection under the laws and on how to improve coordination of the vast array of Federal programs that directly or indirectly affect civil rights," and to provide a progress report regarding its activities no less than every six months.

While we commend the President for establishing the Working Group, we are concerned that there may only be a limited window for it to fulfill its stated mission. Accordingly, now that the Working Group has been established, it should be held strictly accountable to the directives and timeframes contained in the President's memorandum.

3. Designate a White House Official with Responsibility for Civil Rights Policy

We recommend that the President immediately vest with civil rights responsibility an official in the White House who reports directly to the President. This official's responsibility should include providing guidance and direction to agency and department heads.

One manifestation of the White House's failure to provide clear direction on civil rights policy is the absence of a person at the White House with designated civil rights responsibility. Such a person is needed to provide coordination where civil rights issues cross policy lines, and to provide guidance and, on occasion, political assistance where civil rights issues are controversial or sensitive. The designation of such a person is critical to effective civil rights enforcement.

4. Appoint Judges with Commitment to Equal Justice Under Law

We recommend that the President require his judicial nominees to share his commitment to equal justice under law. We also urge the President to continue his pledge for diversity in his judicial appointments by including in his selections qualified women and minorities committed to equal justice under law.

The President has already named a good many highly qualified and distinguished attorneys to the federal courts who reflect the diversity of America and share his commitment to equal justice under law. Even so, the President has hardly made a dent in the largely conservative judiciary appointed by his Republican predecessors. For this reason, it is important that vacancies be filled as soon as possible with qualified women and minorities who share the President's commitment to equal justice under law. The President should consider people with varying backgrounds and views, provided they have a commitment to equal justice under law. It is especially important for the President to avoid backing away from potential nominees with distinguished records and strong commitment to equal opportunity simply because they may be controversial.

5. Develop Comprehensive Urban Policy to Provide Opportunity to Economically Disadvantaged Citizens

We recommend that the President develop a comprehensive urban policy designed to provide opportunity to economically disadvantaged citizens, particularly minorities who live in high concentrations of poverty in inner cities.

In 1994, almost all of the public discussion about inner cities centers on pathology and concerns proposals to institute punitive measures such as cutoffs of welfare benefits to unmarried mothers and more stringent sentences for repeat criminal offenders. Whatever the merits of such proposals may be, they deal almost exclusively with how to deal with problems after they have arisen rather than with prevention.

It is vitally important that the Clinton Administration develop and present an alternative (or complementary) vision. A comprehensive urban policy should address the needs of children for preschool child development, for immunization and health treatment, for adequate nutrition, for reading programs in the early grades. Such a policy should examine how parents can best be assisted in the education of their children and how continuing and caring adult guidance can best be provided where parents or relatives do not provide it. The policy should address access to training, higher education ,and employment opportunities for young adults. It should deal with housing opportunities in cities and suburbs and how economically disadvantaged citizens will be given access to public services on terms that will give them the same kinds of opportunities as those enjoyed by the more affluent. It should also address how, through empowerment zones and other economic measures, effective incentives will be provided for job creation in inner cities and how community development and housing initiatives will revitalize neighborhoods.

The policy should have as a cornerstone those measures (such as Head Start, health and nutrition programs, metropolitan school and housing initiatives) whose effectiveness has already been demonstrated. It should be built on values of choice, with access to opportunities provided both inside and outside central cities. It should leave wide scope for community initiatives, share information with states and communities about programs that have worked, and make use of public–private partnerships.

The Administration should furnish estimates of the costs of such a program, along with a practical schedule for implementation. While a comprehensive program will be costly, a comparison of the costs now being incurred by neglect and of the rising costs of relying on prison construction and incarceration may serve to further public understanding of the real choices facing the American people.

President Clinton should also discuss candidly the barriers that continued racial prejudice and misunderstanding pose to constructive solutions to our urban problems and the ways in which we can surmount barriers of racial prejudice and fear.

6. Revitalize the Equal Employment Opportunity Commission

We recommend that the President make revitalizing the Equal Employment Opportunity Commission a high priority for his Administration.

Revitalizing the Equal Employment Opportunity Commission (EEOC) is critical for effective civil rights enforcement, with new leadership at the agency an important first step. Although the President has appointed a Chair, Vice-Chair, and a new Commissioner to the EEOC, he has yet to name a General Counsel. This position should be filled as soon as possible. With the change in personnel should come changes in agency policy. First, the new leaders should commit themselves to using systemic approaches to law enforcement, such as class action lawsuits. Second, the EEOC should work with representatives of various advocacy and constituent groups to establish strong mechanisms accompanied by appropriate safeguards for alternative dispute resolution. Mediation and conciliation processes that produce fair settlements of discrimination complaints can reduce the backlog and help restore public confidence in the effectiveness of the agency. Third, it continues to be important for the EEOC to issue guidance to employers about unresolved issues relating to employment protections. Finally, the EEOC should take assertive positions in its regulations, policy guidelines and litigation, to ensure that federal anti-discrimination laws accomplish their remedial purposes.

7. Revitalize the United States Commission on Civil Rights

We recommend that the President make revitalizing the United States Commission on Civil Rights a high priority for his Administration.

The U.S. Commission on Civil Rights, which served as America's conscience during the 1960s and 1970s to help remedy decades of injustice, has in recent years suffered a dramatic loss of stature and direction. President Clinton has taken steps to begin the agency's revitalization by appointing a new Chair. He should continue these efforts by seeking new Commissioners to fill his remaining appointments who will bring expertise, stature and the drive to have the agency once again play a leadership role in civil rights. As the U.S. Commission regains its competence and independence, additional funding should be sought for it by the Administration, and consideration should be given to additional legislative steps to assure the agency's independence.

The newly revitalized Commission, by combining its fact-finding powers with a renewed sense of mission, could again become a significant voice in identifying and seeking solutions to the problems confronting the nation in the field of civil rights. The new Commission should re-incorporate as a major part of its mission frequent evaluations of federal civil rights policies and enforcement.

Federal Civil Rights Policies and Remedies

8. **Provide Necessary Tools for Enforcement**
We recommend that the President send a clear message to all federal departments and agencies that he expects civil rights laws to be enforced by ensuring that the agencies receive the tools needed to perform law enforcement and to implement appropriate monitoring and information collection policies.

The decline of civil rights enforcement during the 1980s was marked by a diminution of resources to perform law enforcement, failures to investigate and monitor, and the failure by enforcement agencies to collect the data necessary to assess compliance with civil rights laws.

Effective law enforcement is not possible without adequate resources. A critical task for the Clinton Administration is to ensure that the civil rights law enforcement agencies have the tools needed to perform their mission.

This does not necessarily mean significant increases in agency appropriations. When statistical data is collected and analyzed properly, the agency may detect patterns or practices that can be investigated and resolved more efficiently than on a complaint-by-complaint basis. When agencies establish effective mechanisms for early resolution of cases through conciliation or other means of alternative dispute resolution, they save the costs of later investigation and enforcement. When department and agency heads provide clear regulatory guidance on the steps needed to comply with the law, and make clear their willingness to employ sanctions against violators, many institutions will comply without the need for protracted agency litigation.

In addition, investing in the professional development needed to assure that staff possess skills in statistical analysis, negotiation, dispute resolution, and other areas, will pay dividends in cost effective performance.

In the end, of course, ineffective enforcement, which permits discrimination to continue, causes additional economic loss to the nation in wasted potential.

For all these reasons, President Clinton should make clear his intention to ensure that all federal civil rights agencies have the tools needed to perform their mission effectively.

9. **Use Affirmative Remedies for Violations of Civil Rights Laws and Encourage Use of Affirmative Action Plans**
We recommend that the President direct the departments and agencies of the federal government to continue to use affirmative action remedies for violations of the civil rights laws and to encourage the use of voluntary affirmative action plans.

The foundation stones of federal affirmative action policy were developed on a bipartisan basis during the Kennedy, Johnson, and Nixon Administrations. Court decisions validating affirmative action policies that are fairly and carefully drawn have been rendered by federal judges appointed by every President from President Eisenhower to the present day. Nevertheless, in recent years, the issue has been politicized.

Both Presidents Reagan and Bush contended that civil right rights policy should be based on a "colorblind" standard. That standard erroneously assumed that the legacy of past discrimination has been erased, and that America no longer has any obligation to continue to work to overcome the consequences of legal inequity that has existed for more than a century.

By contrast, President Clinton appears to understand that the long legacy of discrimination remains, and is unlikely to be eradicated without affirmative steps by government and the private sector to increase opportunity in education, employment, and housing.

Federal policy should encourage affirmative action designed to address past discrimination and to promote opportunity, both as remedies for violations of the civil rights laws, and as voluntary plans implemented to further the legitimate business objectives of employers. Efforts also should be undertaken to implement policies that promote, rather than discourage, opportunities for minorities and women to develop and own businesses. Affirmative action policies should continue to ensure that merit principles will not be eroded.

In addressing this issues, President Clinton will likely encounter resistance from members of the new Republican majority in Congress, which has voiced support for the elimination of minority set-asides and other affirmative action remedies. In addition, the courts continue to hear challenges to minority scholarships and minority business set-aside programs. The President needs to hold fast to a commitment to affirmative remedies to increase opportunities for full participation in our society. In doing so, he should seek assistance from all the sources (including legislators such as Senator Dole, and business leaders) that helped defeat the effort to repeal the Executive Order on Government Contracts in the 1980s.

10. Further Equal Educational Opportunities

a. We recommend that the President direct the Departments of Justice and Education to provide guidance on the appropriate criteria for deciding whether school districts have reached unitary status.

In prior reports, the Commission has stated its view that school desegregation decrees should not be dissolved until all vestiges of prior discrimination have been eliminated. These vestiges include housing discrimination, as well as educational deficits that continue as a result of prior school desegregation.

As the Commission has noted in previous studies, school desegregation remedies, when properly implemented, have been an important tool in improving the educational performance of minority children and providing them with access to higher education and employment opportunities. To permit a return to segregation would place major barriers in the path of the Clinton Administration's professed goal of preparing all children for the education and employment challenges of the next century.

Critical questions still remain concerning the dissolution of desegregation orders and government policy in this area. The Departments of Justice and Education should provide guidance on the appropriate criteria for deciding whether school districts have reached unitary status. Such guidance should make clear that states and school districts are responsible for eliminating as far as practicable the housing and education vestiges of segregation.

b. We recommend that the President direct the Department of Education to vigorously monitor implementation of new provisions of the Elementary and Secondary Education Act designed to ensure that children with limited English proficiency (LEP) are not denied educational services under Title I.

Inflation and years of neglect by government officials in prior administrations have taken a large toll on programs to provide services to language minority students. At the same time, the population of children with limited English proficiency continues to rise. Serious attention to the needs of this growing population is necessary.

Despite the fact that they are eligible for educational services, there is evidence that language minority students are not being adequately served. For example, in many instances, language minority students are inappropriately placed in special education classes solely because of their limited English language skills.

Accordingly, the federal government must take the lead in vigorously monitoring implementation of new provisions of the Elementary and Secondary Education Act designed to ensure that LEP children are not denied the educational services to which they are entitled.

c. We recommend that the President direct the Department of Education to institute an investigation of the ways in which tracking and ability-grouping deny equal educational opportunity to minority students, and provide guidance to states and local school districts on how to eliminate violations and substitute nondiscriminatory policies that are educationally sound.

In-school segregation is an acute problem even in school districts that have been under court order to desegregate school buildings. Devices that easily lead to in-school segregation include tracking and other forms of ability-grouping, which result in isolation of students for significant portions of the school day on the basis of race and socioeconomic status.

With few exceptions, ability-grouping routinely denies educational opportunity to children of color, LEP children, and children from low-income families, for these children are disproportionately tracked into lower-achieving classes. Although proponents of ability-grouping justify the practices on educational grounds, increasingly, researchers have determined that tracking and other practices work significant harm on children in the "lower" tracks, while yielding scant, if any, real improvement in achievement for those in the "higher" tracks. Moreover, the underlying methods to select children for tracks (including assessment instruments and teacher evaluations) may themselves be culturally or racially biased.

Finally, educationally sound instructional approaches are available as an alternative to tracking. They are premised on the belief, now commonly accepted by educators and policy-makers, that all children can learn advanced, challenging academic content. These efforts, which focus on improving teacher and school expectations for disadvantaged students, include intensive teacher training, cooperative learning and team projects, tutoring, and extended time on task (e.g., before and after school programs).

11. Defend Minority Opportunity Districts

We recommend that the Department of Justice defend vigorously Congressional districts drawn up with the purpose of enhancing the electoral influence of minority citizens and assuring that all citizens will have the opportunity to elect the candidates of their choice.

The Supreme Court's decision in *Shaw v. Reno,* which upheld the right of five white plaintiffs to challenge North Carolina's redistricting plan as unconstitutional, has spawned numerous constitutional challenges to Congressional districts designed to enhance the voting influence of minority citizens, as well as much well-publicized rhetoric and commentary denouncing such districts as "racial apartheid." Much of this rhetoric ignores the long history of racial discrimination against minority citizens and the persistence of racially polarized voting patterns. Absent affirmative efforts to enhance their voting influence, minorities in many states will continue to be shut out of opportunities to elect candidates of their choice.

Assistant Attorney General Deval Patrick has demonstrated his commitment to aggressive enforcement of the Voting Rights Act by establishing a voting rights task force that will involve the Justice Department in court challenges in these cases. We urge the Department to defend vigorously minority opportunity districts in court, and to educate the public on the continuing need for positive action on voting rights.

12. Enforce National Voter Registration Act

We recommend that the Clinton Administration ensure compliance with, and aggressively defend against assaults to, the National Voter Registration Act.

The National Voter Registration Act (endorsed by the Commission in 1991 and 1993) is intended to increase electoral participation by eliminating existing barriers to voter registration. The Act will play an important role in restoring faith in the democratic process by enlarging the pool of voters as well as by ensuring that registration processes are implemented in a nondiscriminatory manner. It is critical that the Clinton Administration move quickly not only to ensure compliance with the Act, but also to aggressively defend against efforts to nullify the Act's protections.

13. Promote Public and Private Efforts to Meet Challenges Posed by Inter-group Tensions and Conflicts

We recommend that the President use his bully pulpit to promote public and private efforts to meet the challenges posed by inter-group tensions and conflicts. He and his cabinet should identify initiatives that have been successful in reducing prejudice, building democracy, encouraging citizen action, and other training and education outreach measures designed to address the causes and consequences of these conflicts.

In its 1993 report, the Commission stated that the dismal state of ethnic and race relations was a critical domestic issue confronting the nation, and noted that the growing tensions between groups threatened to undermine the nation's economic and moral progress.

The problems of inter-group tensions and conflicts have, if anything, grown worse and need to be addressed immediately. The U.S. Commission on Civil Rights and the Department of Justice's Community Relations Service, as well as other agencies, have roles to play in addressing the causes and consequences of these tensions and conflicts. Private organizations (including this Commission) certainly would respond to a call to provide assistance in this effort.

14. Support Challenges to Proposition 187

We recommend that the United States be prepared to intervene in support of plaintiffs challenging California's Proposition 187.

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held it was unconstitutional for the state of Texas to deny a free public education to children of undocumented aliens. The Justice Department participated in the case at the lower court level, arguing successfully that Texas's actions unconstitutionally denied equal opportunity to such children.

A new threat to equal opportunity and to the Court's *Plyler* decision has been raised by California's recently enacted Proposition 187, which would deny public education, non-emergency health care, and social services to undocumented immigrants. By intervening in the court challenges to Proposition 187, the United States can raise federal constitutional and statutory arguments to counter the threats posed by the California measure. Accordingly, we recommend that the United States be prepared to join in the court challenges to Proposition 187 in support of the plaintiffs.

15. Support the ADA

We recommend that the President support the continued strength of the Americans with Disabilities Act.

In 1991, we applauded the passage of the Americans with Disabilities Act (ADA), noting that the ADA should help change the way America treats persons with disabilities, thereby paving the way for greater participation by disabled citizens in all aspects of society.

In the wake of the November 1994 elections, attacks on the ADA and on disability civil rights have surfaced, threatening the fulfillment of the promises of the Act. The response of the Clinton Administration will be a gauge of the extent and depth of the President's support of disability rights. We urge the President to work vigorously to protect the civil rights of persons with disabilities, and to support the continued strength of the ADA.

New Legislative Remedies

16. Close the Minority Health Gap

We recommend that the President make improving minority health and closing the health gap between whites and minorities a national priority.

Because minority Americans are less likely than other groups to be covered by private health plans, universal health benefits coverage should have a substantially beneficial impact on minorities, expand their access to health care, and thereby help reduce the health gap.

Accordingly, we urge the President to rally from the temporary setback imposed by the failure to enact a health care initiative during his first two years, stand behind his early pledge to reform the country's health care system, and propose measures that will address the critical health needs of the poor and disadvantaged.

17. Ensure that New Legislation Does Not Impair Civil Rights Programs and Safeguards

We recommend that Congress take steps to ensure that legislation designed to reduce regulation or accomplish other legitimate legislative objectives does not impair civil rights programs and safeguards.

Nowhere in the Republican "Contract with America" is there an explicit guarantee that the party will take necessary legislative steps to end discriminatory practices and secure the equal protection of laws to all persons. To the contrary, several of the proposals contain provisions that may work to impair civil rights enforcement and the realization of equal opportunity. For example:

- In the name of reducing the paperwork burden on private industry, the proposed Job Creation and Wage Enhancement Act may prevent the collection of racial and ethnic data needed to enforce the civil rights laws.
- In the name of eliminating federal mandates to states that are not funded, proposed legislation may relieve states of obligations that are essential to providing equality of opportunity. Even though some proposals exempt anti-discrimination laws from the prohibition against unfunded mandates, the exemption may still allow states to defund programs in education, housing, health, or other areas that are essential to the exercise of civil rights.

Accordingly, the Congressional leadership should establish procedures for examining all legislation to which it wishes to give priority, to ascertain its effect on civil rights. Where there is a potential adverse impact, the legislation should be deferred until adequate civil rights protections are devised.

18. Strengthen Congressional Equal Employment Policies

We recommend that Congress take steps immediately after the commencement of the 104th Congress to strengthen its internal equal employment policies and practices, to ensure that such policies and practices will be implemented with respect to all its employees, and in particular with new hires, and to report to the public by June 1995 on the results of its efforts.

Members of both parties in Congress have spoken for years about the need to apply equal employment laws to the Congress itself. While the "Contract with America" calls for the application of certain enumerated anti-discrimination laws to the House, this should not be allowed to stand as unfulfilled campaign rhetoric; it is essential that these laws be *enforced* with respect to both Houses. For example, Congress is now in the process of making the largest number of new hires in many decades (perhaps ever). The leadership of both Houses should establish appropriate procedures to ensure that persons often excluded from positions of responsibility — blacks, Latinos, Asian Americans, women, disabled persons, older persons — are considered for all positions. The leadership should collect information and publish a report on the results of its equal employment opportunity efforts by June 1995.

19. Support Passage of Pending Litigation on Equal Remedies, Justice for Wards Cove Workers, and Equal Employment Opportunity

We recommend that the President support passage of the following civil rights legislation:

The Equal Remedies Act

The Equal Remedies Act would ensure that victims of intentional, on-the-job discrimination on the basis of gender, religion, and disability receive full damages to compensate their losses. The Civil Rights Act of 1991 places an arbitrary cap on damages for victims of such discrimination — a cap that does not exist for victims of race or national origin discrimination. The Equal Remedies Act will remove the damages cap and so establish for all groups the full range of remedies that only some now enjoy. The availability of damages coupled with stronger alternative dispute resolution procedures at the EEOC may provide real incentives for out-of-court settlements of meritorious discrimination claims.

The Justice for Wards Cove Act

The Justice for Wards Cove Act is also designed to eliminate a loophole created by the Civil Rights Act of 1991. That Act reversed the Supreme Court's 1989 *Wards Cove* decision for all Title VII claims except for those of the original plaintiffs in that case. Simple fairness requires that the Wards Cove workers be covered by the new legal standard created by the Civil Rights Act of 1991, and receive the protection of that law.

The Employment Non-Discrimination Act

The Employment Non-Discrimination Act is new legislation modeled after Title VII of the Civil Rights Act of 1964 and is designed to cover the same entities as Title VII without disturbing Title VII's protections against discrimination based on race, color, national origin, gender, and religion. The Act prohibits employers from discriminating against any employee, gay or heterosexual, based on that employee's perceived or actual sexual orientation. (Unlike Title VII, however, employers would not be required to justify neutral practices that have a disparate impact on people of a particular sexual orientation or to engage in affirmative action.)

Introduced late in the 103rd Congress, the Act received support from an impressive coalition of civil rights groups, gay rights groups, religious groups, women's groups, and Democratic and Republican members of Congress. Endorsement of the Act would demonstrate a firm commitment to ensuring and expanding equal employment opportunity for all.

Finally, we recommend that the President, the Congress, the Attorney General, the Assistant Attorney General for Civil Rights, the Secretaries of the Departments of Health and Human Services and Housing and Urban Development, and the Chairs of the Equal Employment Opportunity Commission and the U.S. Commission on Civil Rights, and other appropriate sub-cabinet and agency officials review and give serious consideration to the recommendations of the authors of the working papers in Part Two of this report.

Endnotes

[1] The New York Times, December 15, 1994, pp. A1, 24.

Part Two:

Working Papers

Chapter IV

Minority Poverty: The Place-Race Nexus and the Clinton Administration's Civil Rights Policy[1]

by George Galster

I. Introduction

For millions of Americans the hallowed social premise of equal opportunity has been reduced to ashes as surely as many neighborhoods in South Central Los Angeles. For none has this been more true than racial-ethnic minority groups living in central cities of our larger metropolitan areas. Economic opportunity has increasingly become attenuated for them because they have had to confront the massive industrial dislocations of the postwar era while bearing the twin burdens of place and race. The result has been an intensifying socioeconomic polarization characterized by a staggering incidence of poverty among minority households.

The essay begins by discussing how the traditional civil rights concept of equal opportunity needs to be reconfigured in light of the emerging geographic realities of metropolitan America. It then illustrates the extent and intransigence of racial and ethnic inequalities by reviewing data on education, employment, and earnings from the last two decades.[2] The source of these inequalities is explored by analyzing evidence on how both place and race limit minorities' opportunities. Finally, the essay will critique how well the civil rights policy approaches of the Clinton Administration (specifically: (1) fighting housing and lending discrimination; (2) deconcentrating low-income households; and (3) encouraging stable residential integration) have responded to this diagnosis of the problem of minority poverty.

II. The Concept of Equal Spatial Opportunity

Consider first what is meant by "opportunity." I view opportunity as having dimensions of both process and prospects. The process dimension of opportunity refers to the way in which markets, institutions, and service delivery systems (for example, the social welfare or educational system, legal and illegal labor markets, criminal justice system, or housing market) utilize and modify the indelible endowments and acquired characteristics of those who participate in these markets, institutions, and systems. The way people are treated by the entire panoply of markets, institutions, and systems with which they may come in contact in ways affecting their socioeconomic advancement I will call the "opportunity structure."

The prospect dimension of opportunity refers to the prospective socioeconomic outcomes (likely streams of future income or status) that people perceive will transpire were they to make particular decisions regarding education or labor force participation, for instance. These estimated outcomes will be influenced both by the person's indelible endowments (race, for example) and by acquired attributes (education, for example). But they are also shaped by the person's subjective perceptions of how the opportunity structure will judge and (perhaps) transform these attributes.

When we, as a society, speak about "equal opportunity," we typically do not mean equal socioeconomic outcomes (estimated or actual), but rather that: (1) those with equal endowments should be treated equally as they interact with the opportunity structure, and (2) some endowments (such as race), that are not the same across individuals, should not be used by the opportunity structure as a basis for unequal treatment. Put differently, the conventional notion of equal opportunity focuses on the process dimension.

I believe that this focus on process is appropriate, but is not carried to its logical conclusion. That is, the conventional definition of "equal opportunity" overlooks the geographic dimension.[3] It says that the markets and institutions with which people come in contact should treat them equally, without regard to race or gender, for instance. But what if some people find it difficult to access particular markets or institutions because they reside far from them? What if some have equal access, but the resources available to and policies promulgated by these markets and institutions are very different from those that others access? Clearly, if we are to take equal opportunity seriously, we must introduce a geographic element.

The conventional concept of equal opportunity should be expanded beyond "equal treatment of equals in a given market or institution" to include either:

- Markets and institutions having equivalent resources and policies across metropolitan areas, or
- Households having equal abilities to reside in the particular locations in a metropolitan area where they deem the markets and institutions most desirable.

This expanded view of equal opportunity forces one to ask new questions.[4] How unequal are markets and institutions across metropolitan geography? How confined are households to certain areas of residence and, thus, to particular markets and institutions? What are the resulting differences in the environments in which people of various backgrounds make choices about school, work, fertility, and crime? In the following sections of this essay I will try to provide some answers.

III. Racial-Ethnic Inequalities in Education, Employment, Earnings, and Poverty

Inequalities among groups defined by racial and ethnic status can be measured along many dimensions. Here I focus on four crucial and interrelated dimensions of socioeconomic status: education, employment, earnings, and poverty rates. Each dimension reveals not only current wide interracial disparities, but also ones that typically have persisted or even grown over the last two decades. The disparities are particularly striking in metropolitan areas.

A. Education

Fundamental changes have taken place in the nation's economy in the last two decades, most dramatically the decline in high-wage manufacturing employment and the growth in both low- and high-wage service-sector employment. The burgeoning service-sector employment appears bifurcated: jobs either lack adequate pay, benefits, and chances for advancement, or they require considerable skill or substantial educational credentials.[5] Considering the increasing importance of education, the statistics concerning interracial disparities in school attainment are sobering.

Table 1 shows secondary school dropout rates for those between the ages of 16 and 19, for whites, blacks, and Hispanics during the last two decades. Although dropout rates for both whites and blacks have declined modestly, those for Hispanics have remained roughly the same. Interracial disparities in dropout rates can be seen either by taking ratios of figures or their differences; both are presented in this and subsequent tables. In both relative and absolute terms the black versus white gap in dropout rates narrowed slightly from 1972 to the mid-1980s, but has remained constant since. By both measures it has widened progressively between Hispanics and whites. Today, black youths are 60% more likely to drop out of secondary school than whites; Hispanic youths are 290% more likely.

The situation is especially bleak for students in large, central city school districts. As shown in Table 2, the dropout rates in such districts are well above the national average of 11%. Indeed, the dropout rate in the nation's 47 largest urban school districts combined is almost twice the national average.[6] Not surprisingly, all these districts enrolled large majorities of non-white students.[7]

College completion rates, as shown in Table 3, also evince wide, rigid disparities. Higher fractions of all three racial-ethnic groups graduate from college now than 20 years ago. The fraction has grown in absolute terms more rapidly for whites, however, resulting in an ever-growing difference in completion rates for higher education, especially between whites and Hispanics.[8] This gap is partially explained by the interracial differences in secondary school dropout rates, but not completely. Even among high school graduates, college completion rates evince wide racial differentials. For illustration, by 1989 only 11.8% of black high school graduates had also graduated from college; the corresponding percentage for all persons was 21.1.[9]

B. Employment

As in the case of educational attainment, conventional indicators of labor market activity have evinced significant and steadfast racial-ethnic disparities over the last two decades. Table 4, for example, shows that for all three racial-ethnic groups, the percentage of their population 16 years and older who are gainfully employed has gradually increased.[10] The gap between whites and Hispanics has remained around two percentage points throughout the period; an even larger seven percentage point gap has persisted between whites and blacks.

Employment disparities appear even more dramatic when unemployment rates are examined. Table 5 shows, for example, that Hispanics' absolute unemployment rates have consistently remained at least three percentage points higher than whites'. This translates into a relative difference of over 70%. The gap for blacks has been twice as large in both absolute and relative terms.[11]

Some of these differences in labor market activity are, of course, related to the aforementioned gaps in educational attainment. But this is hardly the complete story, as Table 6 suggests. The upper panel of Table 6 shows that blacks and Hispanics of either gender have higher unemployment rates than whites of the same educational attainment. For black and Hispanic men the gap in unemployment rates grows relatively higher as the educational attainment category increases. Place of residence also matters, as data in the bottom panel of Table 6 indicate. For black men and women and Hispanic women the unemployment gap with whites is substantially higher among central city residents than among those living in the suburbs.

C. Earnings

For many, the socioeconomic bottom-line is represented by the third dimension of interracial polarization: earnings. Table 7 portrays the severe and amazingly persistent pattern of income inequality among whites, blacks, and Hispanics. Consistently throughout the last two decades the median household income (in inflation-adjusted terms) of blacks has remained about 59% of that earned by whites; the median figure for Hispanic income is 72% of that earned by whites. In absolute dollar differences the black–white median income gap stands at more than $12,000; the Hispanic-white gap is more than $8,000. Both gaps have grown in real terms during the period.

D. Poverty Rates

A similar portrait is painted by statistics on poverty rates. Table 8 shows that black families have maintained a poverty rate that is roughly three-and-a-half times (20 percentage points higher than) the poverty rate of white families. By comparison, the Hispanic rate is roughly three times higher (16 percentage points more) than that of whites.

Once again, some of these interracial disparities can be traced to differences in educational attainment, but crucial gaps remain. In their pathbreaking study of earnings changes over the last decade, Harrison and Gorham found that high school educated blacks experienced a 34% increase in their number who worked in jobs paying at less than the poverty level; the figure for comparable whites was only 24%. As for college graduates, 20% of blacks in 1987 still worked under the poverty line, whereas 17% of such whites did so; 13% of blacks earned more than $35,000 annually, whereas 26% of whites did so.[12]

Taken collectively, the foregoing statistics paint a sobering picture of severe and persistent racial-ethnic disparities in the key educational, employment, earnings, and poverty characteristics that embody socioeconomic status. The following section explores the cause of this situation.

IV. The Place-Race Nexus and the Causes of Minority Poverty

Given this overview of the statistics of inequality, I turn to their causes: the place-race nexus. Members of racial-ethnic minority groups disproportionately face a metropolitan spatial pattern of markets and institutions that substantially constrains their mobility within socioeconomic strata. Some of the most important place-based constraints are: segregated housing; lack of positive role models as neighbors; limitations on capital; inferior public services; lower-quality public education; more violent, drug-infested neighborhoods; and impaired access to employment and job-related information networks. As if these spatial penalties were not enough, racial-ethnic minorities face the additional burdens of discrimination in a variety of markets. Some forms of discrimination tend to lock minorities into particular spatial niches; others tend to erode the socioeconomic payoffs from certain market choices and preclude other choices altogether. Put differently, minorities generally lag behind Anglos economically because of more limited opportunities. That is, the choices they make regarding education and work and the socioeconomic payoffs that they gain from such choices are subjected to a more restrictive set of spatial and racial constraints. This phenomenon I call the "place-race nexus."

My view represents a synthesis of what has been seen as "demand-side" versus "supply-side" explanations of minority poverty.[13] The former, articulated in its most recognized form by Wilson,[14] argues that technological and geographic changes in the structure of American industry have reduced the demand for lower-educated laborers, especially central city African American males. The latter, presented forcefully by Mead,[15] posits that young African Americans have substantial employment possibilities at or above minimum wage, but choose not to supply such labor. Such supply limitations reputedly arise because of defeatist attitudes about the chances of economic advancement and/or of avoiding discrimination.

In order to substantiate the importance of the place-race nexus, I turn to a fuller development of the notions of place and race constraints on economic opportunities in the next two sections.

V. Place Constraints on Opportunity

The place component of opportunity refers to the geographically varying set of constraints associated with markets, institutions, and systems in a metropolitan area that limit minorities' personal and intergenerational socioeconomic advancement. This spatial structure (what I have called the metropolitan opportunity structure) has eight key components: housing market, political system, social system, criminal justice system, social service delivery system, educational system, labor market, and finance market. Below I describe each of these components, how they vary across space, and the sorts of constraints they may present disproportionately to racial-ethnic minorities as a result.

A. Housing Market

The housing market component of the metropolitan opportunity structure involves the construction, maintenance, alteration, and pricing of housing, local land use and building codes, and systems for the marketing and transfer of residential properties.

Where one lives is perhaps the most fundamental component of the opportunity structure because it significantly influences every other component. Unfortunately, the racial dimension of American metropolitan housing markets may be summarized with two words: segregation and centralization.

It is conventional to measure segregation with a "dissimilarity index," which shows how evenly various racial-ethnic groups are spread across neighborhoods within metropolitan areas. A score of zero on this index indicates that the proportion of any particular group is the same across all neighborhoods ("integration"); a score of 100 indicates that every neighborhood has residents of only one particular group ("complete segregation"). As Table 9 shows, virtually all of our major metropolitan areas where large numbers of minorities live are highly segregated. Although there have been modest reductions in white–black and Anglo–Hispanic segregation since 1980, there has been little change since 1960.[16]

Moreover, minorities not only tend to live apart from whites, but their residences tend to cluster in or near the older, core municipality of the metropolitan area. Even though more minorities than ever live in suburbs, they remain relatively as clustered near the core as ever, because whites have increasingly moved out of the core and inner-ring suburbs and into metropolitan fringes.[17]

The cause of this phenomena are complex. Suffice it to note here that interracial economic disparities, housing stocks increasingly separated into homogeneous value or rent groupings, most Anglos preferences for predominantly Anglo neighborhood racial composition, and illegal racial discrimination all contribute.[18]

More importantly for the purpose at hand, both segregation and centralization erect distinct obstacles to the socioeconomic advancement of minorities. Segregation can contribute to inter-group disparities in at least four ways.[19] First, separate informal networks and formal institutions serving the minority community, because they have a narrower scope and base of support, will have fewer financial, informational, and human resources to draw upon; therefore they will offer inferior options for the development of human capital and the discovery of alternative employment possibilities. Second, isolation can encourage and permit the development of distinct subcultural attitudes, behaviors, and speech patterns that may impede success in the mainstream world of work, either because they are counterproductive in some objective sense or because they are perceived to be so by prospective white employers. Third, an identifiable, spatial labor market may be formed in the minority community and attract employers offering only irregular, low-paying, dead-end jobs. Fourth, interracial competition and suspicions are abetted, encouraging the formation of discriminatory barriers in many markets, as we shall see below.

The primary means by which the centralized pattern of minority residence affects minority well-being are twofold. First, minorities' employment opportunities will be restricted in light of progressive decentralization of jobs (especially those paying decent wages only with modest skill requirements) in metropolitan areas. The ability of minorities to both learn about and commute to jobs declines as proximity to them declines.[20] Second, as we shall see below, location in central city more likely confronts a financially distressed municipality and public school system. This means that inferior public services despite high tax rates may be the unenviable situation facing centralized minorities.

The statistical evidence makes it clear that minority households are significantly affected by the constraints imposed by segregation and centralization. One study estimated, for example, that racial segregation increases the probability that a young black man does not work by as much as 33%, and the probability that a young black woman heads a single-parent family by as much as 43%.[21] Other studies found that if we could cut segregation by 50%, the median income of black families would rise 24%,[22] the dropout rate would fall by over three-fourths, and poverty rates for black families would drop 17%.[23]

B. Political System

The political system refers to the structure of local political jurisdictions, their fiscal capacities, and the types of power minority groups exert in them. A notable feature of most American metropolitan areas is their jurisdictional fragmentation: numerous municipalities, school districts, counties, and special-purpose districts subdividing the landscape into a complex, sometimes overlapping patchwork of jurisdictional boundaries.

The primary way that this fragmentation raises constraints for minorities is by intensifying income-class spatial segregation and attendant fiscal disparities among jurisdictions. Middle-income and upper-income suburbs limit the residential options of lower-income households by adopting restrictive land-use and housing policies. This residential segregation of income classes by jurisdiction leads to large disparities in fiscal capacity, especially when coupled with increasingly aggressive competition for employment between districts.[24] In turn, because of the economic polarization between whites and minorities, income class segregation in the context of jurisdictional fragmentation ultimately constrains the quality of education and other public services and the number of municipal employment options available to minorities. The coincidence of race-class segregation produces powerful racial effects as well, as we shall see below.

The political coalitions that control local governments can have significant influences on urban opportunities through their hiring practices, regulations, and contract awards. Minority power in urban governance varies dramatically from city to city. Further, the ability of minorities to convert power into avenues for economic advancement for large numbers of their constituents also varies widely across cities.[25]

C. Social Systems

Social systems consist of voluntary associations and social institutions at the neighborhood level, interpersonal networks, and community norms and values. An individual's neighborhood can provide a variety of institutional and interpersonal contacts that promote social mobility. Informally, neighbors can provide information about educational or employment opportunities and implicit support for norms and behaviors conducive to advancement. Formal association within the community can play important roles in stabilizing and mobilizing economic, social, and psychological resources for advancement.[26]

Quantification of local social systems is problematic. Nevertheless, numerous qualitative studies have concluded that, in many minority neighborhoods of many metropolitan areas, these social systems have become (or are rapidly becoming) dysfunctional.[27] In these areas, kin, friends, and community organizations are becoming less able to provide, in times of temporary financial distress, the material assistance needed to prevent more serious spells of poverty, or even hopelessness.[28] Some researchers see an exodus of middle-income minority residents from neighborhoods inhabited by lower-income residents, leaving the latter bereft of role models to raise aspirations and legitimize participation in the labor force.[29] Others see crack cocaine as debilitating many potential role models and overwhelming extended kinship support networks.[30]

In their pathbreaking investigation, Fernandez and Harris analyzed data on a variety of social contacts by African Americans living in Chicago census tracts where 20% or more of the residents were classified as poor.[31] They found that, independent of one's own economic status, the percentage of poor residents in one's neighborhood provided an important determinant of a variety of social contacts. African American women living amid concentrations of low income people had fewer church contacts, less frequent and deep interpersonal contacts, and a smaller percentage of "mainstream" friends, those who were well-educated, employed, and not on public assistance. African American males evinced a similar relationship for contacts with political and social institutions and "mainstream" friends.[32] As an illustration of the magnitude of these powerful neighborhood effects, nonworking poor men and women who lived in a tract with no other poor individuals had roughly a quarter of their friends on public assistance. If they lived in a tract comprised completely of poor individuals, however, nearly two-thirds of their friends were on public assistance.[33]

The foregoing points to the importance of concentrations of low income people — above and beyond an individual's low income itself — in shaping local social networks. Because of increasing spatial concentrations of lower-incoming minority populations, minorities bear a disproportionate share of socially isolated neighborhoods.[34] Put differently, urban minorities are much more likely to have more low-income neighbors than urban whites, even when the minorities and whites are of the same socioeconomic status. As noted above, this means a greater erosion of social networks for minorities, and thus a more limiting set of constraints on their ability to use networks to achieve gains in socioeconomic status. But as we shall see below, there also are deleterious effects on the local school systems.

D. Criminal Justice System

The criminal justice system includes police and court procedures and resources, local legal sanctions, sentencing practices, and community-based security efforts. Although not normally thought of in geographic terms, there is reason to believe that it operates in different ways across neighborhoods within a metropolitan area.

The criminal justice system in many urban neighborhoods seems to be caught in a dilemma, either branch of which constrains economic opportunities of some individuals. On the one hand, police in many neighborhoods have failed to control rampant violence, most often associated with the drug trade. Such violence can erode social networks and discourage residents from working because of fear of leaving their homes. On the other hand, concentrated policing of such areas and subsequent stiff sentencing practices for these convicted may have criminalized many (especially youthful) offenders. By exposing offenders to the brutality of the prison system and branding them with criminal records, the criminal justice system may severely limit their future life chances. Consider more fully both sides of the dilemma.

African Americans and Hispanics have been disproportionately victimized by crimes against persons for at least the last two decades. See Table 10. In 1988, roughly eight out of 100,000 white males were the victim, of a homicide while 58 out of 100,000 black males were victims. The comparable figures for white and black females were three and 13, respectively.[35]

The above statistics can be traced to a complex amalgam of deprivation, unravelling social networks, gang-related activities, and the use and trafficking of drugs, especially crack cocaine.[36] Indeed, the spatial coincidence of minority poverty concentrations, violent crimes, and criminal drug use and trafficking is notable. In Washington, D.C., for example, arrests for drug use or possession in 1980 were six times higher per capita in neighborhoods having more than 40% of their residents below the poverty line than in nonpoverty areas. From 1980 to 1988 the increase in *per capita* drug arrest rates was eight times greater in the former areas. Violent crime rates in these concentrated poverty neighborhoods were three-times higher than those in nonpoverty ones in 1980; the increase in such crimes in the poverty areas was almost five times greater from 1980 to 1988.

The confluence of violence and drugs in certain minority occupied neighborhoods creates a host of interlocking constraints on residents' ability to enhance their socioeconomic status through legitimate means. As noted above, isolation from middle class role models increases as "old heads" (middle-aged males formerly working full time in the legitimate economy) are siphoned off into the world of crack dependency, at the same time that new role models come to the fore as wealthy, glamorous drug lords. Kin networks are shredded by prolonged exposure to the consequences of members who abuse drugs; perversely, some kin networks serve as conduits for teaching drug-culture norms to youths.[37] Other residents of these crime-ridden neighborhoods limit their social contacts and labor force participation out of fear of violent crime. Still others have their accumulated financial and human resources pillaged by property and personal crime, respectively. There thus appears to be an urgent need to fight crime and drugs. Unfortunately, the way we as a society have chosen to carry out the fight — selective neighborhood police sweeps coupled with stiff mandatory prison sentencing — has produced unintended consequences that impose almost insuperable constraints on many minority youths.

A variety of studies have documented the staggering racial differentials in arrest and incarceration rates. For example, in New York State in 1990, 23% of African American males aged 18-35 years old were under criminal justice supervision (in jail, awaiting trial, or being sought for arrest, or on probation or parole); the comparable figure for white males was 3%.[38] In major urban areas the figures are even more dramatic: 42% of the 18-35 year old African American men in the District of Columbia and 56% of them in Baltimore were under criminal justice supervision on an average day during 1991.[39] Seventy-three percent of those booked by the Cook County (Chicago) Department of Corrections in 1989 were blacks and 9% were Hispanics. During 1989, 29% of the county's black male population aged 20-29 years were jailed at least once, compared to 6% of Hispanics, and 4% of white males of similar ages.[40]

The psychological consequences of prolonged incarceration and stigmatization are probably profound, though difficult to measure. More easily quantified is the employment effect. Freeman's analysis of 1980 National Youth Survey data revealed that 50% of those sampled who were in jail or on probation were employed for at least one month during the six months prior to incarceration, but only 10% were employed during any of the three months afterward.[41]

E. Social Service Delivery System

The social service delivery system consists of public and private charities, bureaus, and the social welfare benefit systems they administer. Primarily ignited by the work of Murray,[42] a debate has raged about whether welfare systems have produced perverse, unintended consequences that have encouraged a variety of choices that intensify poverty. Murray argued that 1960s-era welfare programs (especially AFDC) encouraged out-of-wedlock childbearing, discouraged women from marrying, and discouraged men from accepting low-pay/low-benefit jobs. Although Murray's analysis has been convincingly criticized, subsequent investigations indicate that at least some of his conclusions are supported, especially for urban African Americans.

Of most relevance for the present purpose is the work of Eggers and Massey, who estimate a structural model of welfare, labor force participation, family formation, and earnings across a 1980 sample of large metropolitan areas.[43] They find both strikingly similar and dissimilar relationships for whites, blacks and Hispanics. Higher welfare payments seemed to raise whites' and Hispanics' male and female employment rates, lower blacks' male and female employment rates, and increase the proportion of female-headed families for all three groups. The last effect was about five-times greater among blacks and four-times greater among Hispanics than among whites, however. A metropolitan area with a $1,000-higher annual welfare benefit package would be predicted to have a two percentage point higher rate of minority female-headed families. In turn, an increase by 10 percentage points in the rate of female headship translated into $2900, $1500, and $2900 declines in median family incomes for whites, blacks, and Hispanics, respectively. When all employment and family effects were combined, however, the impact of the value of welfare benefits on the proportion of poverty was virtually nil for Hispanics, somewhat positive for whites, and most positive for blacks. The relative magnitudes of these effects were 1:2:5, respectively.[44]

This study strongly suggests that the social service delivery system is an important element shaping incentives, although it does not reveal precisely what behaviors it influences. Other studies suggest that welfare has little impact on fertility decisions, but that it can discourage remarriage after divorce, increase the probability of divorce among women with children, and raise the propensity of unwed mothers to form independent households.[45] Furthermore, the evidence implies that the effects of the social service delivery system are not uniform across groups, but can help explain durable racial-ethnic inequalities in socioeconomic status.

F. Educational System

The educational system includes public and private elementary and secondary schools, and their associated bureaucracies and parent-teacher organizations. Education is a complicated channel for upward mobility. There are many schooling choices, and different subgroups of the urban population favor different paths. It appears that choices of public versus private schools, various public school districts, and courses of study within a particular school all affect academic achievement and the likelihood of labor market success.[46] However, the possibility of exercising choice (by migration to the suburbs, enrollment in a private school, selection of a more academically oriented curriculum) often seems remote for urban minority groups.[47] The result is a set of educational opportunities that are spatially variant and profoundly differentiated by race and ethnicity.

Racial differences in enrollment patterns reveal one dimension of this differentiation. Dissimilarity indices of the degree of segregation between school districts for selected metropolitan areas for the 1989-1990 school year are presented in Tables 11 and 12. They show that black students are generally more unevenly distributed across districts than are Hispanic students, but that both minority groups are highly segregated from Anglos across school districts, in rough correspondence to their degree of residential segregation.[48] But where are minority students preponderantly concentrated? Nationally, two-thirds of African American students and nearly half of other minority students attend primary and secondary schools in central city districts; less than a quarter of white students do so.[49] In the Chicago metropolitan area in 1990, three of every four black children and two of every three Hispanic children attended the Chicago public schools; only one in twenty white children did so.[50]

New research by Gary Orfield[51] demonstrates that the isolation of black and Hispanic students from white students has been increasing, especially in major metropolitan areas. Two of every three black students in 1992 attended schools in which more than half the student body was either black or Hispanic; the comparable figure for Hispanics was almost three or four. In Illinois, Michigan, New York, New Jersey, and Pennsylvania, more than 40% of black students attended schools where more than 90% of students were minorities. In New York, New Jersey, and Texas, more than 40% of Hispanic students had similar segregated situations.

Thus, the educational constraints facing the vast majority of white students are quite different from those facing African American and Hispanic students. Moreover, the educational opportunities of African American and Hispanic students are intimately connected to inner-city districts in the largest metropolitan areas. Unfortunately, these districts tend to be racially, economically, and socially isolated and inferior providers of education on several counts.

Today in the 47 largest central city school districts, whites comprise, on average, only 25% of the student population, while African American comprise 42% and Hispanics 27%. Although the student population in these districts accounts for only 13% of the nation's enrollment, it includes 25% of students from homes below the poverty level and 32% of those for whom English is a second language.[52] Across metropolitan Chicago high schools, there was a .92 correlation between the percentage of African American and Hispanic students and the percentage of students from low-income households in 1986. Although no predominantly white elementary schools in the area had as many as one-third low-income students, nine-tenths of elementary schools that were over 90% African American or Hispanics had a majority of low-income students.[53]

Thus, racial and economic segregation in the housing market is producing racial and economic segregation in the education system and social systems. These systems place more limits on the educational achievement and attainment of poor children from African American and Hispanic families because these children have less contact with children from non-poor families.[54] Racial segregation makes it more difficult for non-poor minority children to build on their parents' progress toward upward social mobility, because the critical mass that influences their education and social systems is more heavily influenced by children from poor families.[55]

Finally, race and income segregation in housing markets and in the education and social systems also can make it harder for minority children to acquire the "soft skills" valued in the labor market. These skills, especially styles of communication and interpersonal relationships, likely are derived from social patterns prevailing in white, middle-class culture. Children first may learn communication and interpersonal skills from family members and neighbors. Schools give children a second chance to learn these skills, however, because students interact with schoolmates from other families and neighborhoods. The opportunity structure appears to provide poor white children with opportunities for economic integration in the school and neighborhood, but typically denies these opportunities to minority children. That is, minority children have little exposure at home or in school to patterns that set the standard for workplace communication and interpersonal relationships. These children may therefore develop alternative patterns that may serve them well on the streets, but hinder them in the workplace.[56]

Inner-city schools manifest inferiority in other resource dimensions as well. Compared to suburban districts, the 47 largest urban districts spend $873 less per pupil;[57] fiscal disparities between individual districts can be even more dramatic.[58] Inner-city students' teachers are, on average, less well-prepared, come from inferior colleges, and are fewer in number in several critical subject areas. The same is true of guidance counselors.[59]

In combination, the aforementioned limitations on social, financial, and human resources produce the expected inferior performance outcomes. For example, the "nonselective segregated high schools" serving about two-thirds of Chicago's students graduated only eight percent of their students with reading ability at the national norm level.[60] Nine out of 10 Cleveland students (the vast majority of whom are minorities) failed the state proficiency exam in 1991.[61] Unsurprisingly, disproportionate numbers of minority students find dropping out to be a rational decision in light of such school quality, as demonstrated in Table 2. Perhaps most damning of all, many employers appear to be writing off graduates of inner-city school systems as prospective employees.[62] Minority students who pursue college find the combination of inferior training and limited exposure to whites a deterrent to persisting in college. Thus, not only have the African American and Hispanic versus white gaps in college entrance rates been rising during the 1980s, but so have the gaps in college completion rates.[63]

G. Labor Market

The labor market component refers to the number of jobs and the distribution of employment by industrial and occupational category, location, skill requirements, advancement potential, on-the-job training, wages, and benefits. The metropolitan labor markets have been characterized in recent decades by deindustrialization and decentralization.

Fundamental changes have taken place in the nation's economy in the last two decades, most dramatically represented by the decline in high-wage manufacturing jobs and the growth in both low- and high-wage service-sector employment. From 1967 to 1987, for example, Chicago lost 60% of its manufacturing jobs, Detroit lost 51%, New York City 58%, and Philadelphia 64%. These four cities have the most severe concentrations of minority poverty. In these same central cities, moreover, service-sector job growth was dramatic.[64] A concomitant shift raising the educational requirements of many jobs has reduced the demand for low-skilled labor. The same cities above experienced a similarly severe loss of jobs held by those with only a high school diploma or less.[65]

Given that African Americans and Hispanics are concentrated in the lower end of the educational distribution, the burdens of this industrial restructuring have fallen most heavily on them.[66] In large Northeast central cities in 1968-70 only 19% of black males age 16-64 with no high school diploma were not working; by 1986-88, this had risen to 44%. The comparable figures for whites were 15% and 36%.[67] In large Midwest central cities the percentage of black males with no diploma who were not working rose from 24% to 58%; the comparable figures for whites were 12% and 39%.[68]

The decentralization aspect of the urban labor market refers to the fact that the remaining manufacturing jobs have progressively shifted to suburbs and small towns. These shifts, coupled with the continuing concentration of minorities near the urban cores, has created a spatial mismatch on top of the skills mismatch. Potential minority workers' opportunities both to learn about and commute to jobs declines as their proximity to them declines, as noted above. Minorities living in the suburbs apparently have overcome this mismatch problem. As evidence, the rate of joblessness among black males with no diploma actually decreased from 1980 to 1986 in the suburbs of the same Northeast and Midwest metropolitan areas cited above.[69] Although the empirical significance of the mismatch hypothesis has been much debated,[70] there seems little doubt that labor market opportunities are becoming more strongly differentiated over space in ways that put African Americans and Hispanics in ever more-disadvantageous positions.

H. Finance Market

The last component of the metropolitan opportunity structure related to minorities' opportunities involves the institutions that make loans for starting, expanding, or acquiring businesses, or buying, building, or renovating residential properties. One strategy for enhancing socioeconomic status that skirts the urban labor market is self-employment in small business. Successful pursuit of this route depends critically on the entrepreneur's education and personal financial resources, and therefore it is no surprise that rates of self-employment are much lower for minorities.[71] Capital constraints, however, remain the single largest obstacle to African Americans and Hispanics starting businesses; Asian entrepreneurs appear to have less capital constraints.[72]

Part of the limitation on capital is, of course, due to the aforementioned inferiority in education and personal assets. Yet, even controlling for those and other differences, it appears that bankers are less willing to lend if a borrower's business is located in a minority community.[73] Additional lending barriers have been created by the numerous recent bank mergers, because many smaller operators located in minority communities that used to be prime sponsors of new businesses have been eliminated. Banks remaining in these communities but owned by large conglomerates may have less sensitivity or commitment to local entrepreneurs.[74] In sum, it appears that the commercial finance market offers a different set of opportunities for entrepreneurs depending on the race of the owner and the location of the operation.

The ability to accumulate wealth in the form of home equity depends similarly on the availability of mortgage loans. The mortgage market (in combination, of course, with the housing market) will determine the degree to which renters can become homeowners and homeowners can make capital gains and move up to higher-priced homes. Access to such residential options not only influences the likelihood of acquiring an asset that will appreciate,[75] but also influences access to neighborhoods possessing social networks, good public education, and job opportunities that promote upward social mobility.

Many studies have discovered that African American and Hispanic neighborhoods receive a disproportionately small flow of mortgage loans, even controlling for a variety of factors which serve as proxies for the demand for residential financing.[76] There are multiple reasons for this observation.[77] Lenders may not be effective in developing loan products, marketing them, and locating branch offices in ways that attract minority applicants.

Minority mortgage applicants tend to have smaller downpayments and weaker employment and credit histories than their white counterparts, resulting in their higher rates of denial.[78] Underwriting standards employed by lenders may disproportionately impact minority borrowers by discouraging loans in transitional neighborhoods and those with mixed land uses.[79] And, as we shall see below, there is mounting evidence of intentional racial-ethnic discrimination in the underwriting process. Again, these factors coalesce to present spatially differentiated opportunities to obtain financing.

VI. Race Constraints on Opportunity

In the previous section I demonstrated how each of eight key components of the metropolitan opportunity structure varied across space in the degree to which it presented constraints to socioeconomic achievement, and in such a pattern that African Americans and Hispanics were more severely hindered by their location than were whites. In this section I consider an additional factor: race (or ethnicity) itself. Independent of their metropolitan location, minorities' racial-ethnic status defines a personal constraint that further impedes their chances for success because of discrimination in multiple market and institutional contexts. This section briefly considers evidence of discrimination in several components of the metropolitan structure defined above: the housing market, criminal justice system, labor market, and finance market.[80]

A. Housing Market

Incontrovertible evidence of the persistence, extent, and magnitude of racial-ethnic discrimination in metropolitan housing markets has been provided by dozens of studies employing paired testers who pose as home or apartment seekers. Gaining initial prominence during the HUD-sponsored Housing Market Practices Survey of 40 metropolitan areas in 1977, paired testing became a prosaic investigative tool during the 1980s, culminating in the HUD-sponsored Housing Discrimination Study of 25 metropolitan areas in 1989.[81] This research has revealed: (1) housing discrimination against both African American and Hispanic home seekers and apartment seekers occurs in roughly half of the instances when these persons interact with an agent; (2) typically this discrimination is subtle in nature and therefore difficult for the individual to detect; and (3) the frequency of housing discrimination appears not to have changed noticeably since 1977.[82]

As noted before, one of the most serious consequences of such discrimination is increased racial-ethnic segregation. A variety of econometric models suggest that if discrimination were to be eliminated from metropolitan areas where it now assumes its national average level, segregation would decline by at least one-fourth and perhaps by nearly one-half.[83]

B. Criminal Justice System

Although the evidence of racial bias is more circumstantial and qualitative than in the area of housing markets, a growing body of evidence suggests that the criminal justice system concentrates its police efforts disproportionately on minorities and treats minority offenders more harshly once they are apprehended (either by intent and/or effect). Much of the recent controversy has been spawned by the intensified "War on Drugs," an effort that, according to one commentator, is "biased on all fronts and has made young black men its enemy."[84]

The anti-drug effort has focused on police sweeps in selected drug-trafficking neighborhoods. Typically these neighborhoods are heavily minority occupied, which, not surprisingly, nets a preponderance of minority offenders, especially African Americans. For example, in Baltimore during 1991, more than 11,000 of the approximately 13,000 people arrested on drug charges were African Americans; 1,304 African American youths were charged with drug sales, whereas only 13 white youths were so charged.[85]

These differences cannot be attributed to greater drug use by African Americans. Whites make up 77% of all illegal drug users, Africans Americans 15% and Hispanics 8%, roughly equal to their proportions in the population.[86] For males in high school, rates of marijuana or cocaine use have been higher for whites than Africans Americans, consistently since 1976.[87]

Once arrested, African American offenders face an even tougher panoply of mandatory sentencing laws, instead of non-incarceration or treatment options. It has been estimated, for example, that 70% of Atlanta's anti-drug resources are directed toward punishment, with only 30% for treatment.[88] The consequence, as noted above, is a generation of African American youths indelibly stamped by incarceration, with the concomitant distortion of their labor market opportunity structure.

C. Labor Market

Much evidence exists indicating that racist practices in the hiring, compensation, training, and promotion of minorities persist in metropolitan labor markets, reducing their chances of obtaining jobs and limiting their occupational options once they obtain employment.[89] In the conventional analysis of wage discrimination, the earnings of minority and white workers are compared when other factors serving as proxies for their productivity are controlled for statistically. Any unexplained residual between the groups constitutes evidence of such discrimination. Statistical evidence based on this methodology shows declines over time in unexplained wage gaps for both African Americans and Hispanics, although there remain significant variations across subgroups according to region and education.[90]

Of course, wage comparisons ignore intergroup variations in unemployment, underemployment, and characteristics of employment. As with wage disparities, employment disparities that cannot be accounted for by differences in productive characteristics provide statistical evidence of labor market discrimination. Here, the evidence for reduced discrimination is considerably weaker. For example, as shown in Table 6, with rare exception, black and Hispanic men and women experience higher unemployment than whites at all levels of schooling. Thus, black and Hispanic men who have graduated from college are more than twice as likely to be unemployed as white college graduates. Relative patterns of minority underemployment parallel those of unemployment.

In addition to higher unemployment and underemployment, minorities are more likely than whites to be in jobs offering fewer opportunities for career growth. Controlling for characteristics such as education and marital status, Boston[91] finds that the probability of black men and women moving from secondary-sector jobs (jobs characterized by low levels of training) to primary-sector jobs offering more training is about one-half the corresponding probability for whites.

Beyond the statistical record, controlled experiments using paired testers have investigated hiring discrimination. In these experiments, minority job applicants are paired with Anglo applicants. The applicants are given similar backgrounds and are chosen and trained to be as similar as possible in job-related characteristics such as appearance, articulateness, and apparent energy level. How the minority applicants are treated in job applications can then be observed and compared with the treatment received by their Anglo "twins."

One study of entry-level jobs, involving 360 paired male applicants for randomly selected employers, found that foreign-looking/sounding Hispanics were 30 percentage points less likely to receive interviews and job offers than their matched Anglo counterparts.[92] Another study targeted at entry-level jobs concluded that in one of five paired tests, the Anglo male applicant was able to advance farther through the hiring process than his equally qualified African American counterpart.[93] Such experiments provide irrefutable evidence of pervasive hiring discrimination.

The type of discrimination that hiring tests measure might be referred to as applicant discrimination: Minority applicants for jobs are treated differently than Anglo applicants. Unfortunately, even if this type of discrimination were eradicated, minorities would still continue to experience higher unemployment and underemployment than non-Hispanic whites. The reason is that employers hire using informal networks that are discriminating in effect.

The existence of network or word-of-mouth hiring has been documented from jobs at the very highest levels of corporate employment to jobs requiring little or no training. Recent studies of the glass ceiling document network hiring for highly skilled corporate positions and unskilled employment.[94] Waldinger and Bailey describe how informal networks exclude minorities from work in construction.[95] Word-of-mouth hiring has the advantage that it is less costly in terms of time and money than advertising and it ensures a certain type of applicant who will mesh with other employers. By trying to replicate their current workforce through word-of-mouth hiring, many employers are simply following a common human trait of sticking with the tried and true. The societal problem with this type of hiring, however, is that it excludes applicants outside employers' familiar domains. As such, both overt hiring discrimination and seemingly benign hiring techniques contribute to the lower earnings, limited employment, and occupational/industrial segregation of minorities.

D. Finance Market

Over a decade ago, a handful of studies analyzed various unpublished data sources showing mortgage loan application dispositions by characteristics of the borrower. These statistical studies showed that race had statistical significance in explaining high minority denial rates in most of the metropolitan areas investigated, even when other legitimate financial characteristics were controlled.[96] After a long hiatus, the method recently was replicated by the Federal Reserve Bank of Boston in their analysis of over 3,000 mortgage loan underwriting decisions taken by 131 Boston-area banks, savings and loans, mortgage companies, and credit unions during 1991.[97] Their statistical analysis revealed that African Americans and Hispanics, in general, had more indebtedness, lower downpayments, and weaker credit histories than typical white applicants, and that these factors did explain a substantial share of the observed 2.7-to-1 ratio of minority-to-white denial rates. Even controlling for all such differences, however, minorities were 60% more likely to be denied. This appeared to be the case for both large- and small-scale lenders equally.

This important study not only provides "conclusive evidence of *de facto* discrimination,"[98] but it also hints at the reasons for this outcome. Minorities with unblemished credentials were not denied. But the majority of borrowers — of any group — were not perfect, and thus lenders had considerable discretion about how seriously they would assess the imperfections and whether offsetting factors might be present. It was in this "gray area" that whites were favored systematically.

A dramatic illustration of systematic differential treatment of minorities by a mortgage lender is provided by the recently settled suit, *U.S. Department of Justice v. Decatur (GA) Federal Savings and Loan Association.*[99] The Department of Justice concluded that at least 48 African Americans were discriminatorily denied mortgages between January 1988, and May 1992. The lender redefined its market service area to exclude large proportions of the African American population, rarely advertised its products in media oriented toward this community, and employed a virtually all-white staff of commissioned account executives who solicited business from real estate agents operating in white neighborhoods, but rarely those operating in African American ones. As a result, 95% of its loans were originated in white neighborhoods.[100]

Additional evidence has been culled from three experiments conducted between 1988 and 1991 that employed paired testers to probe behavior of lenders before formal applications were made. These experiments were conducted in Louisville, Chicago, and New York City.[101] They revealed incidents when loan officers provided more information, assistance, and encouragement to the white tester and tended to direct the minority tester toward government-insured loans.

The foregoing discussion has dealt with discrimination in terms of illegal differences in treatment based on a protected classification like color, race, or national origin. Yet, given precedents established in other contexts, such as housing and employment, discrimination can also be defined in terms of disparate impact: evenhanded treatment that results in adverse consequences for legally protected classes. A New York State Banking Department examination of 10 savings banks found four promulgated standards (such as high minimum downpayment ratios and loan sizes) that could adversely affect minority neighborhoods. The report was critical of all 10 banks' failure to offer FHA-insured mortgages and of six banks' inadequate outreach activities in local communities.[102]

Beyond mortgage lending, there also is some evidence that discrimination exists in the commercial lending market. Ando analyzed the experiences of minority and white owners who had been in business at least two years and who had applied for loans during a three-year period in the early 1980s.[103] White-owned firms had 90% of their applications approved; 87% of Hispanic-owned and only 62% of black-owned firms' applications were approved. Controlling for business experience, firm size, credit rating, industry, marital status, and collateral, black borrowers were still less likely to be approved.

VII. Implications for Evaluating the Clinton Administration's Civil Rights Policies

I have attempted to demonstrate that we have deep, multidimensional, and persistent polarization among Anglos, African Americans, and Hispanics in our metropolitan areas, and that this polarization can be traced to two different categories of constraints on minorities' socioeconomic advancement. Some of these constraints are associated with the place in which that individual resides; others are associated with the racial-ethnic identity of the individual. I marshalled evidence to demonstrate that polarization is, indeed, a result of place and race.

If we were to take this analysis seriously, clear policy implications emerge. In this article I can only provide an outline of these implications; I have, however, provided fleshed-out analyses elsewhere.[104] To combat constraints based on race, a toughening of anti-discrimination policy is required. This does not merely mean enhancing penalties for violators, increasing outreach to inform victims of their rights and means of redress, improving the speed of case adjudication, and expanding civil rights training of all those involved in the various urban market contexts where discrimination occurs, although all such efforts are to be applauded. Rather, it takes a completely different enforcement strategy, one based on matched testing investigations conducted by civil rights agencies, that creates a viable deterrent to discrimination.

The flaw in the American civil rights enforcement approach is that it relies upon the victim to recognize and formally complain about suspected acts of discrimination. Given the subtlety of discrimination as typically practiced today, such reliance is misplaced. As a result, there is little chance of violators fearing detection or litigation; there thus is minimal chance of deterrence.

What is needed is a transfer of resources to empower private and governmental fair housing agencies to conduct ongoing enforcement testing programs, employing pairs of matched investigators who pose as housing, mortgage, or job seekers. These programs would not merely respond to complaints of alleged victims, but would provide an ongoing presence in areas rendered "suspicious" by other evidence or, resources permitting, randomly throughout the market. Only through such a comprehensive enforcement testing policy can people be deterred from using race to constrain the opportunities of others.[105]

To combat constraints based on place is even more controversial and complex. Some have suggested that residential locations can be continued if access to good jobs and schools is enhanced through, for example, new transportation schemes, enterprise zones, or school choice vouchers.[106] I argue that such schemes are inferior to those that aim directly at expanding the spatial extent of residential choices and desegregating communities by class and by racial-ethnic composition.[107] The gist of the argument is that unless the iron grip of residence is released, all other ameliorative efforts will necessitate inefficient subsidies and distortions of the market, and will be blunted by elements of the metropolitan structure that cannot easily be ruptured from the residential nexus: local social systems, political systems, and the criminal justice system.

What primarily is needed, therefore, are policies to deconcentrate low-income individuals and encourage stable, racial-ethnic integration. The first need is an intensified effort to expand geographically the housing choices for the less-well-off through voucher-like subsidies coupled with affirmative efforts to market residential areas that might be unfamiliar to subsidy recipients and, perhaps, ongoing supportive counseling services to smooth recipients' transition into new environments. The second need is for comprehensive policies to encourage the movement of all households into neighborhoods where their racial-ethnic group is underrepresented. By developing pro-integration strategies aimed both at lower levels of government and individuals, the federal government should take the lead in such policy development.

VIII. Evaluating Key Civil Rights Initiatives of the Clinton Administration

The evaluative criteria presented in the previous section can now be applied to a critique of several key civil rights initiatives that have emerged thus far from the Clinton Administration. I believe that in the first two of the three areas noted above — anti-discrimination, deconcentration of low-income individuals, and pro-integration — the Administration has made important advances. Efforts in all three areas are described only briefly below, inasmuch as more detailed discussions are presented by other authors in this volume.

In retrospect, these civil rights efforts seem surprising, given the paucity of treatment accorded them during the 1992 Presidential campaign.[108] President Clinton's appointment of Eugene Ludwig to head the Office of the Comptroller of the Currency (OCC), Janet Reno as Attorney General in the Department of Justice (DOJ), and Henry Cisneros as Secretary of the Department of Housing and Urban Development (HUD) has reaped significant dividends in the civil rights arena, however. Ludwig has spearheaded efforts to toughen regulatory oversight of lenders, Reno has championed "coordinated civil rights enforcement activities" among agencies, and Cisneros has become "the administration's leading spokesman on race relations."[109]

For his part, President Clinton made a statement supporting "fair housing and fair lending" in the January 1994 State of the Union Address. On January 17, 1994, he issued an Executive Order, "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," which established a Fair Housing Council. This body, which brings together representatives of all cabinet departments and major agencies, has three major goals:

- Review the design and delivery of all federal programs to ensure that they affirmatively further fair housing;
- Propose programmatic revisions and new programs to affirmatively further fair housing; and
- Develop a pilot program in at least one metropolitan area to demonstrate the use of a coordinated, interagency approach to enhancing fair housing.

Although staff supporting the Fair Housing Council have begun work, at this writing there is no way of assessing the significance of their recommendations or ultimate programmatic changes.

President Clinton also has convened an Interagency Task Force on Fair Housing Lending, involving HUD, DOJ, and the federal financial institution regulatory agencies. On April 15, 1994, this Task Force issued a statement of policy to guide industry compliance with the Equal Credit Opportunity Act, the Community Reinvestment Act, and the Fair Housing Act.

Besides these overarching civil rights coordination initiatives in the area of housing and lending, several important specific advances have been made in fighting discrimination and encouraging the dispersal of low-income populations. Considerably less effort has been expending on pro-integrative policies. Each category is considered below.

A. Anti-Discrimination Efforts

The Housing Market. Both HUD and DOJ have expanded their fair housing enforcement activities under the Clinton Administration.[110] Perhaps the centerpiece of these activities is stepped-up efforts involving testing. HUD's Fair Housing Initiatives Program (FHIP), initiated in 1987, has been significantly expanded: from $11 million in FY 1993 to $20 million in FY 1994 to $26 million in FY 1995. In FY 1994 FHIP provided 59 grants to private fair housing groups to support their efforts to test real estate practices and litigate suspicious findings. It also succeeded in creating 24 new private fair housing groups in areas where none previously existed. HUD itself has won several fair housing cases where it was plaintiff.[111]

DOJ also expanded their fair housing enforcement testing investigations, begun under the Bush administration. At this writing there are five groups of DOJ testing teams conducting unannounced pattern and practice investigations across the nation; they have thereby already won 18 court cases against discriminating landlords, with settlements as high as $175,000. During FY 1994, DOJ also handled 34 housing cases based on race that were referred to it by HUD, with damage awards as high as $61,000.[112]

Perhaps less visible but no less important have been administrative changes at HUD that have enhanced enforcement capabilities:

- Instead of reporting to a HUD field official who is also responsible for other HUD programs, investigators will report directly to HUD's chief enforcement official in Washington, D.C.;
- The system of determining whether private-party fair housing complaints should be brought to trial will be located in the Office of the Assistant Secretary for Fair Housing and Equal Opportunity, instead of in field offices;
- The investigation process has been revamped, such that the number of cased closed "administratively" (i.e., with no finding and no formal record of the settlement) has been greatly reduced.

Community-Based Residences. In a move that elicited a storm of protest,[113] HUD investigated community groups in Berkeley and New York who opposed the placement of group homes for the homeless and mentally disabled, respectively, in their neighborhoods. Although these actions arguably had a chilling effect on the expression of citizens' First Amendment rights, they do raise intriguing questions at the ambiguous intersection of several valued, but sometimes contradictory, public goals: freedom of speech, local government land use powers, and fair housing. Although the two cases did not deal explicitly with race, it is clear that the principles contested here have significance to the issues of racial discrimination and deconcentration of low-income households. Would protest be permitted if a minority family were to move into an all-white neighborhood, or would such protest be equivalent to harassment? Would a local government be permitted to enact zoning regulations even when they had clear and significant disparate impacts on minorities?[114] HUD has served a valuable function by raising these complex questions for public debate.

The Mortgage Market. Henry Cisneros' claim that, when it came to fair lending, the Clinton Administration was "changing the way we do business and we mean business,"[115] proved not hyperbole. Indeed, there are numerous indicators of tangible intensification of fair lending enforcement efforts:

- HUD's Mortgage Review Board's oversight of independent mortgage companies' HMDA performance resulted in numerous actions;[116]
- HUD established special fair lending divisions in all 10 regional enforcement centers and trained investigators;
- Through the FHIP program, HUD sponsored preapplication testing of lenders by the National Fair Housing Alliance, which has produced litigation;
- DOJ and HUD entered into an agreement to enhance use of enforcement resources and coordinate strategies and investigations;
- The OCC has begun a pilot program to ascertain whether testing can be used effectively as part of the periodic lender examination process;[117] and
- HUD is working to ascertain whether FHA lending regulations create illegal disparate impacts on minority borrows.

Two important recent cases belie DOJ's increasingly aggressive fair lending posture. The Shawmut Mortgage Company (Boston) was sued by DOJ in December 1993, alleging discriminatory treatment in loan approvals. The settlement required the company to revise its underwriting procedures and compensate victims to the tune of almost $1 million.[118] In perhaps its most controversial initiative, DOJ in August 1994, accused Chevy Chase Federal Savings Bank (Washington) of violating fair lending laws by failing to extend services to predominantly black neighborhoods in the Washington, D.C., area. The settlement reached called for Chevy Chase to provide special mortgage packages to applicants in the neighborhoods adversely affected, open more loan offices in these areas, and hire more black loan officers; cost to the company has been estimated at $11 million.[119]

B. Deconcentration of Low-Income Households

HUD's Mobility Agenda.[120] Henry Cisneros has made "promoting the geographic mobility of low-income households" a main priority of HUD.[121] HUD has continued to implement the Moving to Opportunity (MTO) demonstration, originally instituted in 1991. Now being tested in five cities — Baltimore, Boston, Chicago, Los Angeles, and New York — MTO provides Section 8 rental subsidies to residents of public and assisted housing, who are aided in moving to low-poverty areas throughout the metropolitan area by a non-profit organization. Cisneros' HUD has also advanced two of its own initiatives.

The Choice in Residency (CIR) Program is designed to enhance the residential mobility of those using regular Section 8 certificates and vouchers. The proposed CIR will provide grants that will fund comprehensive tenant counseling services supplied by non-profit organizations, such as housing search strategies, transportation assistance, and information to help assisted familites move and rapidly adapt to non-poverty neighborhoods. It will also attempt to reach out aggressively to recruit Section 8 landlords in such neighborhoods.

The Metropolitanwide Assisted Housing Strategies demonstration will fund a (governmental or non-profit) clearinghouse to coordinate information about housing assistance on a regional basis. A key component would be a unified waiting list for assisted housing throughout the region so that eligible tenants would be offered the first available unit, regardless of location. CIR-like counseling could also be provided to facilitate moves and other supportive services could also be centralized to create "one-stop shopping" for assisted households.

Public Housing Deconcentration. HUD has undertaken important demonstration initiatives to deconcentrate some of the most infamous, high-rise public housing projects. One billion dollars is slated for more than 20 cities to demolish some of their worst, high-density projects and replace them with lower-density developments in areas without poverty concentrations. Some existing public housing sites are slated for redevelopment to create mixed-income communities.

C. Pro-Integration Policies

HUD under Cisneros has moved affirmatively to settle numerous desegregation suits that had been brought against it and local Public Housing

Authorities (PHAs) during previous Administrations. These suits alleged that defendant PHAs had practiced explicitly racially segregationist policies, such as maintaining separate waiting lists for projects on the basis of race. The current HUD strategy in settling these cases seems to be one of offering (among other things, like public housing modernization funds) Section 8 subsidies to minority plaintiffs, in conjunction with the aforementioned CIR-like counseling services to encourage desegregative moves out of public housing and minority neighborhoods.[122] In some cases, like in Vidor, Texas, HUD has seized direct control of a recalcitrant PHA to ensure that it speedily complies with desegregative mandates.

Despite these commendable efforts to desegregate public housing, HUD and the rest of the Administration has done precious little to support the efforts of numerous communities and non-profit groups aimed at achieving stable, racial integration of non-subsidized households. One possible venue for addressing this gap is the new Fair Housing Planning requirements. HUD soon will issue regulations under this rubric that will require communities to analyze impediments to fair housing as part of their Community Development Block Grant application. Hopefully, these regulations will go beyond encouraging the fight against discrimination to encouraging pro-integration initiatives.

Additional federal programs should be designed to encourage lower levels of government to adopt coordinated pro-integration programs that fit their local contexts. Encouragement could be supplied through the careful tailoring of intergovernmental transfers. Federal bonus funds to states might, for instance, be provided for establishing and/or supporting regional fair housing organizations (either public or private) that enforce anti-discrimination laws and promote neighborhood racial integration in their metropolitan areas. Similarly, direct federal financial aid to municipalities for any number of activities might be awarded for formal cooperation with such a regional organization. Awards might be given to school districts progressing toward integration targets. Another set of federal integration incentives could be directed toward individuals. Those who make moves that promote integration could be rewarded with a tax credit based on their moving expense deduction. Individuals receiving Section 8 vouchers or certificates might be more strongly encouraged to make pro-integrative moves by appending special bonus housing subsidies to them.

IX. Conclusion

Persistent socioeconomic polarization among racial-ethnic groups has been a central fact that continues to dominate the discussion of inequality in America today. I have argued in this essay that this persistence has occurred because the numerically dominant minorities, African Americans and Hispanics, face the twin burdens of place and race. Laws to the contrary notwithstanding, minorities continue to face severe amounts of discrimination in housing, lending, and other markets as well as in the operation of certain public institutions. Even if discrimination were to cease, however, African Americans and Hispanics generally live in neighborhoods where adults' and childrens' chances for economic success are attenuated. Thus, policy aimed at reducing socioeconomic inequalities must be based on both race and place. Specifically, I argued for enhanced enforcement testing, dispersal of low-income populations, and pro-integration schemes.

Fortunately, the Clinton Administration has made important advances in the former two areas. One could always argue that the absolute amount of resources devoted to these advances has been too modest. While I agree, such should not obscure the fact that a sea change in federal direction has occurred.

I recognize that enforcement testing, dispersal of low-income populations, and pro-integration schemes are not widely popular policy options. They are necessary nonetheless. This suggests that continued courageous national leadership will be required. This will be especially true if the new, Republican-dominated Congress aggressively opposes the gains made so far. Perhaps the key to political palatability is stressing that these policies are not about massive transfers of resources or "handouts," but rather are about creating pre-conditions for more equal opportunities, surely a principle enjoying bipartisan support. Without such continued political will, place and race will continue to distort constraints in ways that maintain racial-ethnic polarization. The hallowed premise of an "equal opportunity society" will remain a hollow promise for many minority citizens of America.

Endnotes

[1] Sections of this paper are based on "Polarization, Place, and Race," *North Carolina Law Review* 71 (June 1993): 1421-62; and "The Geography of Metropolitan Opportunity," *Housing Policy Debate* 6 (1995) forthcoming.

[2] When it is not awkward to do so, I will refer to racial-ethnic differences, not merely racial ones, in recognition of the fact that Hispanics may be of any race. This essay focuses on differences among Africans Americans, Hispanics, and Anglos (non-Hispanic whites), as they are the predominant racial-ethnic groups in most American metropolitan areas. I will employ the aforementioned language whenever possible. When citing governmental statistics, however, I will employ their terminology: blacks, Hispanics, and whites. When the data so specify I will note whether whites are confined to Anglos or not. Finally, I recognize that the term Hispanic encompasses a wide array of national origins and groups of varied socioeconomic success. Unfortunately, Census and other readily available data rarely disaggregate the Hispanic category, so I have been forced to follow a similar convention.

[3] This is analogous to what has been called "the principle of equality of life chances." *See* JAMES FISHKIN. 1983. JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY. New Haven, CT: Yale University Press.

[4] Note that this notion of geographic equity conflicts with the notion of geographic efficiency formulated by Charles Tiebout. 1956. "A Pure Theory of Local Expenditures." JOURNAL OF POLITICAL ECONOMY 64:416-24.

[5] For more on industrial restructuring and its effects on educational requirements, see John Kasarda, *Urban Industrial Transition and the Underclass* 501 ANNALS AM. ACAD. POL. SOC. SCI. 26-47 (1989). A more comprehensive description of educational inequalities is provided by Gary Orfield and Sean Reardon, "Race, Poverty, and Inequality" in *New Opportunities: Civil Rights at a Crossroads*, ed. by Susan Liss and William Taylor. Washington, D.C.: Citizen's Commission on Civil Rights (1993).

[6] *See* Mary Jordan, *Ills of Big-City Schools Tied to Lower Spending*, WASHINGTON POST, September 23, 1992, at A.3 (Citing Educational Resource Service and Council of Great City Schools).

[7] For a fuller analysis of contemporary conditions facing minorities in inner-city schools, *see* Edward Hill & Heidi Rock, *Race and Inner-City Education in* THE METROPOLIS IN BLACK AND WHITE: PLACE, POWER, AND POLARIZATION 108-127 (George Galster & Edward Hill, eds., 1992) [hereinafter METROPOLIS].

[8] The apparent narrowing of the gap when expressed in relative terms is misleading here, because whites and Hispanics began with such a small base percentage in 1970.

[9] U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1991, table 223 (1991).

[10] Note that those not employed may either be unemployed (but looking for work) or not participating in the labor force.

[11] John Blair and Rudy Fichtenbaum provide a fuller analysis of black-white differences in unemployment, underemployment, discouraged workers and, especially, how they relate to the most disadvantaged subgroup of all: black male youth. *See* John Blain & Rudy Fichtenbaum, *Changing Black Employment Patterns* in METROPOLIS, Op. Cit. at 72-92.

[12] Bennett Harrison & Lucy Gorham, *African-American Wages in the 1980s* in METROPOLIS, Op. Cit. note 4, at 56-71.

[13] *See* the discussion in Harry Holzer, "Black Employment Problems: New Evidence, Old Questions," 13 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 699-722 (1994).

[14] William Julius Wilson, *The Truly Disadvantaged.* Chicago: University of Chicago Press (1987).

[15] Lawrence Mead, *The New Politics of Poverty.* New York: Basic Books (1992).

[16] Compare Table 9 with Gerald Jaynes and Robin Williams, eds. *A Common Destiny* Washington, D.C.: National Academy Press (1989) Table 2-5.

[17] George Galster, *Black Suburbanization*, 26 Urb. Aff. Q., 621-8 (1991).

[18] For a fuller discussion of these causes and a review of the evidence, *see* George Galster, *Research on Discrimination in Housing and Mortgage Markets*, 3 Housing Pol'y Debate, 639-84 (1992).

[19] For a fuller discussion of these four factors, including supporting empirical evidence, see George Galster, *A Cumulative Causation Model for the Underclass* in Metropolis *supra* note 4, at 190-215 and Holzer Op.Cit.

[20] For a recent review, *see* John Kain *The Spatial Mismatch Hypothesis* 3 Housing Pol'y Debate 371-462 (1992).

[21] Douglas Massey, *et al. Segregation, the Concentration of Poverty, and the Life Chances of Individuals*, 20 Soc. Sci. Res. 397-420 (1991).

[22] George Galster & Mark Keeney, *Race, Residence, Discrimination, and Economic Opportunity*, 24 Urb. Aff. Q. 87-117 (1988).

[23] George Galster, *Housing Discrimination and Urban Poverty of Africans Americans*, 2 J. Housing Res. 87-122 (1991). *See also* the estimates provided by Richard Price & Edwin Mills, *Race and Residence in Earnings Determination*, 17 J. Urb. Econ. 1-18 (1985). Earlier studies have also identified correlations between segregation, centralization, and black-white occupational disparities. *See* George Galster, *Residential Segregation and Interracial Economic Disparities*, 21 J. Urban Econ. 22-44 (1987) and the literature review therein.

[24] Daphne Kenyon, *Interjurisdictional Tax and Policy Competition* (Urban Institute Paper, Washington, D.C., 1988).

[25] *See* Rufus Browning, *et al.* Protest Is Not Enough, (1984); Georgia Persons, *Racial Politics and Black Power in Cities*, in Metropolis, Op. Cit. at 166-89.

[26] For a review of the evidence on the importance of social systems affecting a variety of behaviors through "neighborhood effects," *see* George Galster and Sean Killen, "The Geography of Metropolitan Opportunity: A Reconnaissance and Conceptual Framework," 6 *Housing Policy Debate*, forthcoming (1995).

[27] This appears most strongly to be the case in large central cities of the Northeast and Midwest, and in African American areas. *See* George Peterson and Adele Harrell, *Introduction: Inner-City Isolation and Opportunity*, in Drugs, Crime and Social Isolation (Drugs hereafter) 1-26 (George Peterson & Adele Harrell, eds., 1992).

[28] Robert Taylor, *et al. Parents, Children, Siblings, In-Laws and Non-Kin as Sources of Emergency Assistance to Black Americans*. 37 Fam. Rel. 298-304 (1988).

[29] Wilson, op. cit. at Ch. 1.

[30] Eloise Dunlap, *Impact of Drugs on Family Life and Kin Networks in Inter-City African-American Single-Parent Households*, in Drugs Op. Cit. at 181-207, Ansley Hamid, *Drugs and Patterns of Opportunity in the Inner-City*, in Drugs, Op. Cit. at 109-39.

[31] Roberto Fernandez & David Harris, *Social Isolation and the Underclass* in Drugs, Op. Cit. at 257-93.

[32] *Id.* at Table 9.16.

[33] *Id.* at Table 9.11. Note that all classes had aspects of their social interaction diminished by increased neighborhood poverty concentrations.

[34] Douglas Massey & Mitchell Eggers, *The Ecology of Inequality*, 95 Am. J. Soc. 1153-88 (1990); George Peterson & Adele Harrell, *Introduction: Inner-City Isolation and Opportunity* in Drugs Op. Cit at 1-26; John Kasarda, *The Severely Distressed in Economically Transforming Cities in*, Drugs *op. cit.* at 45-97.

[35] U.S. Dept. of Commerce, Op. Cit. Table 297.

[36] Jeffrey Fagan *Drug Selling and Licit Income in Distressed Neighborhoods in* Drugs, Op. Cit at 99-146.

[37] Dunlap, Op. Cit at 181-207.

[38] Cited by Study by Correctional Association of New York and New York State Coalition for Criminal Justice, Jason DeParle, *DC's Black Men Swept Up By Criminal Justice System* CLEVELAND PLAIN DEALER, April 19, 1992 at 12A. See also Jaynes and Williams, Op. Cit. Ch. 9.

[39] *Id.* at *12A; Baltimore Report Lambastes US Drug War* WASHINGTON POST, September 2, 1992 at D7.

[40] Gary Orfield, *Urban Schooling and the Perpetuation of Job Inequality in Metropolitan Chicago*, in George Peterson & Wayne Vroman, eds.,URBAN LABOR MARKETS 161-199. Washington, D.C. Urban Institute Press (1992).

[41] A "control" group had no change in employment during the period. See Richard Freeman, *Crime and the Employment of Disadvantaged Youths*, in URBAN LABOR MARKETS Op. Cit. at 201-34.

[42] *Charles Murray*, LOSING GROUND (1984).

[43] Mitchell Eggers & Douglas Massey, *The Structural Determinants of Urban Poverty* 20 SOC. SCI. RES. 217-55 (1991).

[44] *Id.* at 235.

[45] *See Id.* at 252 (reviewing recent studies).

[46] *See* Eric Hanusheck, *The Economics of Schooling,* 24 J. ECON LITERATURE 114-77 (1986); Thomas Hoffer, *Achievement Growth and Catholic Schools*, 58 SOC. OF EDUC 74-87 (1985) Karl Alexander & Aaron Pallas, *School Sector and Cognitive Performance*, 58 SOC. OF EDUC 115-128 (1985).

[47] *See* Joe Darden, Harriett Duleep, and George Galster. *Civil Rights in Metropolitan America.* 14 J. URB. AFF. 469-496 (1992); Edward Hill & Heidi Rock, *Race and Inner-City Education*, in METROPOLIS, Op. Cit. at 108-127; Jaynes and Williams, Op. Cit. Ch. 7.

[48] The metropolitan areas with two lowest levels of school segregation (Charlotte, Jacksonville) were subject to court-ordered, cross-district integration plans. See Gary Orfield, *Public School Desegregation in the U.S., 1968-1980* (1983) at Table 21.

[49] Hill & Rock, Op. Cit. Table 7.3.

[50] Orfield, Op. Cit. at 163-4.

[51] Gary Orfield, *The Growth of Segregation in American Schools*. Alexandria, Virginia: National School Boards Association (1994).

[52] Mary Jordan, *Ills of Big-City Schools Tied to Lower Spending*, WASHINGTON POST, Sept. 23, 1992, at A.3. (citing data from Council of Great City Schools).

[53] Orfield, *op. cit.* (1992) at 165.

[54] *See* Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood: in* INNER-CITY POVERTY IN THE U.S. (Laurence Lynn & Michael McGeary, eds., 1990); Ronald Mincy *Underclass Variations by Race and Place* in NEW PERSPECTIVE ON RACIAL ISSUES IN METROPOLITAN AREAS (Jerome Kaufman and Karl Taubman, eds. (1993).

[55] Wilson Op. Cit. (1987) at Ch. 1 and 46-62 argues that ironically, the involuntary confinement of middle class minorities in the ghetto, while harming them, may aid their lower income brethren. For an empirical test of this, *see* Galster, Op. Cit. (1991).

[56] Eileen Bleachman, Mentors for High-Risk Minority Children, presented at conference on Mentoring Program Structures for Young Minority Males, Urban Institute, Washington, D.C., 1991; Katherine Neckerman, What Getting Ahead Means to Employers and Disadvantaged Workers, presented at Urban Poverty and Family Life Conference, University of Chicago, 1991.

[57] Jordan, Op. Cit. at A.3.

[58] Jonathan Kozol, SAVAGE INEQUALITIES New York: Crown (1991).

[59] Orfield, Op. Cit. (1992) at 166-70.

[60] *Id.* at 166.

[61] Norman Krumholz, *Developing Nightmare*, Cleveland Plain Dealer June 3, 1992, at 3C; in 1980 67% of Cleveland Public School children were African-American 4% was Hispanic; Gary Orfield, *Public School Desegregation in the U.S., 1968-1980.* (1983), Table 20.

[62] Joleen Kirschenman and Katherine Neckerman, "We'd Love to Hire Them, But ..." in Christopher Jencks and Paul Peterson, eds. *The Urban Underclass.* Washington, D.C.: Brookings Institution (1991).

[63] Orfield, Op. Cit. (1992) at 170-72. Orfield also notes that the rates of entrance and completion for blacks and Hispanics both fell during the 1960s while they were rising for whites.

[64] Sunbelt cities had generally smaller losses in center city manufacturing employment: *See* John Kasarda, *Severely Distressed in Economically Depressed Transforming Cities* in Drugs, Op. Cit. at 45-97, James Johnson & Melvin Oliver, *Structural Changes in the U.S. Economy and Black Male Joblessness* in Urban Labor Markets, Op. Cit. at 113-149.

[65] Kasarda, Op. Cit. (1992) Table 3.13.

[66] For a fuller review of the evidence, see Philip Moss & Chris Tilly, *Why Black Men Are Doing Worse in the Labor Market.* New York: Social Source Research Council (1991).

[67] The cities were Boston, Newark, New York, Philadelphia, and Pittsburgh: Kasarda, Op. Cit. (1992) Table 3.14.

[68] The cities were Cleveland, Chicago, Detroit, Milwaukee, and St. Louis: *Id.*

[69] *Id.*

[70] Cf. Harry Holzer & Wayne Vroman, *Mismatches and the Urban Labor Market* in Urban Labor Markets Op. Cit. at 81-112; Johnson & Oliver, Op. Cit. at 113-49; Kain, Op. Cit. at 371-462.

[71] *See* Timothy Bates, Major Studies of Minority Business (1990); Timothy Bates & Constance Dunham, *Facilitating Upward Mobility Through Small Business Ownership*, in Urban Labor Markets, Op. Cit. at 239-282.

[72] Bates and Dunham, Op. Cit. at Tables 7.8, 7.9.

[73] Timothy Bates, *Small Business Viability in the Urban Ghetto*, 29 J. of Regional Sci 625-43 (1989).

[74] Joint Center for Political and Economic Studies, *Can America Solve its Biggest Problems?*, 20 Focus 2-10 (1992), (citing Jennifer Henderson, Center for Community Change).

[75] For evidence on differential home appreciation rates depending on neighborhood racial composition, *see* John Simonson & Barbara Lippman, Home Price Appreciation in Central City Low-Income Neighborhood, paper presented at Urban Institute conference on Housing Markets and Residential Mobility, Airlie, VA, 1991.

[76] *See* Katharine Bradbury, *et al.*, *Geographic Patterns of Mortgage Lending in Boston, 1982-87*, New Eng. Econ. Rev. 3-30 (1989); Anne Shlay, *Not in that Neighborhood*, 17 Soc. Sci Res. 137-63 (1988); Anne Shlay, *et al.*, *Racial Barriers to Credit: Comment*, 28 Urb. Aff. Q. 126-140 (1992).

[77] Ronald Wienk, *Discrimination in Urban Credit Markets: What We Don't Know and Why We Don't Know It*, 3 Housing Pol'y Debate 217-40 (1992).

[78] Alicia Munnell, *et al.*, *Mortgage Lending in Boston: Interpreting HMDA Data* (1992).

[79] Ann Schnare, *Secondary Market Business Practices and Mortgage Credit Availability*, presented at Fannie Mae Annual Housing Conference, Washington, D.C. (1992).

[80] For a fuller analysis of discrimination in America, *see* Clear and convincing Evidence Michael Fix & Raymond Struyk, eds. Washington, D.C.: Urban Institute Press (1993).

[81] For a fuller review of housing discrimination research, *see* Galster, Op. Cit. (1992) at 639-84.

[82] Margery Turner, *Discrimination in Urban Housing markets*, 3 Housing Pol'y Debate 185-216 (1992). Discrimination in the marketing of homes has also been observed. *See* Galster, Op. Cit. (1992) at 659.

[83] *See* Galster, Op. Cit. (1992) at 639-84 for a fuller review of the evidence.

[84] Baltimore Report, Op. Cit. at D7 (quoting Jerome Milles, President of the National Center on Institutions and Alternatives).

[85] *Id.* at D7.

[86] *Id.* at D7.

[87] Joint Center for Political and Economic Studies, *Can America Solve Its Biggest Problems?*, 20 Focus 3-10 (1992).

[88] *Id.* at 7 (quoting Judge Thelma Cummings).

[89] *See, e.g.*, John Blair & Rudy Fichtenbaum, ***Changing Black Employment Patterns*** in Metropolis, Op. Cit. at 72-92; George Peterson & Wayne Vroman, ***Urban Labor Markets and Economic Opportunity in*** Urban Labor Markets, Op. Cit. at 1-30; Darden, *et al.*, Op. Cit. Kirscherman and Neckerman, Op. Cit.

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[91] Thomas Boston *Segmented Labor Markets*. 44 Indus & Lab. Rel. Rev. 99-115 (1990).

[92] Harry Cross, *et al*. Employer Hiring Practices Washington, D.C.: Urban Institute Press (1990).

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[97] Alicia Munnell, *et al*. *Mortgage Lending in Boston: interpreting HMDA Data* (Federal Reserve Bank of Boston Working Paper 92-7, 1992).

[98] Paul Wiseman, *Bankers Grumpy Despite Strong Profits*, USA Today, October 19, 1992, at p. 6B. (quoting Federal Reserve Governor John LaWare).

[99] U.S. Department of Justice news release, "DOJ Settles First Race Discrimination Lawsuit Against Major Home Mortgage Lender," (Washington, D.C., September 17, 1992).

[100] For more citations of suits alleging lending discrimination, *see* Cathy Cloud and George Galster, *What Do We Know About Racial Discrimination in Mortgage Markets? 22 Review of Black Political Economy 101-120 (1993).*

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[102] Ernest Kohn, *et al*. Are Mortgage Lending Policies Discriminating? (New York State Banking Dept., Consumer Studies Division, 1992).

[103] Faith Ando, *Capital Issues and Minority-Owned Business,* 16 Rev. of Black Pol. Economy 77-109 (1988).

[104] *See* Darden, *et al.*, Op. Cit.; George Galster. *Federal Fair Housing Policy* in Building Foundations 137-57 (Langley Keyes & Denise DiPasquale, eds., 1990); George Galster, *A Cumulative Causation Model of the Underclass: Implications for Urban Economic Development Policy: in* Metropolis, Op. Cit. at 190-215; Don DeMarco & George Galster, *Prointegrative Policy*, 15 J. of Urb. Aff. 141-160 Op. Cit. (1993).

[105] DeMarco & Galster, Op. Cit. Galster, *Id.* at 142-152.

[106] *See generally, Housing Markets and Residential Mobility* (Thomas Kingsley & Margery Turner eds, Urban Institute Press (1993).

[107] Galster, *A Cumulative Causation Model (*Op. Cit.*)* at 202-208.

[108] *See,* for example, Bill Clinton and Al Gore, *Putting People First.* NY: Times Books (1992).

[109] Guy Gugliotta, "Cisneros Commits HUD to Ending Racial Bias in U.S. Housing Policy," Washington Post (November 5, 1993):A4.

[110] The following section is based on Roberta Achtenberg, HUD Assistant Secretary, Office of Fair Housing and Equal Opportunity. "Statement before the House Committee on the Judiciary Subcommittee on Civil and

Constitutional Rights, Oversight Hearings on Fair Housing," September 28, 1994.

[111] For details, *see* Achtenberg, Op. Cit., pp. 6-9.

[112] Deval Patrick, Statement before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, September 8, 1994.

[113] *See,* for example, ACLU news release, "The First Amendment Protests Your Critics; Let Us Help Safegard the First Amendment Rights of Protestors," August 16, 1994. Paul Roberts, "HUD's War vs. American Taxpayers' Neighborhoods," NAPLES DAILY NEWS, August 28, 1994: p. 3H; Guy Gugliotta, "ACLU Alleges Free Speech Violation in HUD Probe," WASHINGTON POST, August 17, 1994: p. A20.

[114] This issue has been widely discussed in the context of the Mt. Laurel decisions of the New Jersey Supreme Court.

[115] Henry Cisneros, "Statement before the U.S. Senate Banking Committee," November 4, 1993: p.2.

[116] *See* Id., p.3, for details.

[117] Liz Spayd, "White House Targets Mortgage Loan Bias," WASHINGTON POST (May 6, 1993): B12; Associated Press, "Agency to Step Up Vigilance on Loan Discrimination," WASHINGTON POST (March 13, 1993): E2.

[118] Patrick, Op. Cit.

[119] *Id.*

[120] The following section is based on Office of Policy Development and Research, HUD, "Residential Mobility Program," *Housing and Development Brief* (September, 1994): 1-6.

[121] *Id.*, p.5.

[122] Such was the case in the September, 1994, settlement of *Sanders v. HUD* (Allegheny County, PA) and the May, 1994, settlement proposed in *Young v. Cisneros* (East Texas); *See* Achtenberg Op. Cit., pp. 40-44.

Chapter V

An Unseen Attack on Civil Rights: The Anti-Regulatory Agenda in the Contract with America

by Gary D. Bass

Nothing is more sweeping and potentially more dangerous to civil rights protections than the proposed regulatory changes in the Republican "Contract with America." Without ever openly attacking a single protection, the provisions in the Contract can undo each and every one. Most startling is that the procedural changes in the Contract have escaped public scrutiny. They are most often placed under the good-sounding rhetoric of "regulatory reform."

One of the threats before the civil rights community (and the entire public interest community) is that these anti-regulatory proposals are not couched within the framework of any specific program. They are, instead, governmentwide, cross-cutting procedures, which makes it difficult to describe how programs would be affected and, thus, difficult to engage the community on. On the other hand, ignoring the proposals or not making them a high priority to fight will inevitably come back to haunt each and every one of us.

The objectives of the anti-regulatory agenda are not very obscure. The Cato Institute, a conservative think tank that has been working with a congressional regulatory task force newly created by Newt Gingrich, has developed a hit list of programs that Republicans should target for "reform."[1] Among the top dozen include the Civil Rights Act, Americans with Disabilities Act, and the Community Reinvestment Act. Others in the top dozen also affect the civil rights community. For example, changes to Superfund may result in less ability to pursue environmental justice agendas.

Since many of these laws are popular or considered untouchable, the anti-regulatory agenda becomes even more important to the right-wing agenda because changes to these laws can occur under the banner of "regulatory reform" without serious discussion about the changes.

This paper describes the major anti-regulatory elements in the Contract and describes what is known about President Clinton's position on four of these issues that were debated during the 103rd Congress. Since the Reagan Administration, the civil rights community has closely monitored the obscure, behind-the-scenes machinery of government (e.g., regulatory review and paperwork clearance) when it affected such issues as minority contracting, information collected on the decennial census, how race and gender information is collected by the government, and disability, vocational education, and many other program regulations. It must accelerate its vigilance with this new assault.

The Anti-Regulatory Agenda in the Contract with America

On September 23, 1994, prior to the national elections, House Republicans prepared a 10 point Contract with America. The eighth point addressed a plan to roll back government regulations and was called the Job Creation and Wage Enhancement Act. The proposed Act is best known for its proposed capital gains tax cut and other tax initiatives, despite the fact that all the tax provisions account for only 17 pages of an 82-page bill.

At the heart of the bill are radical proposals to dismantle government programs and services, undo various public protections and safeguards, and, in general, make it nearly impossible for Congress to enact future protections. Based on focus group information that the public would like to reduce government red tape, the right wing has launched a smart, rhetorical campaign to dismantle government operations by attacking government regulations.

Key elements of the euphemistically named Job Creation and Wage Enhancement Act include:

- A requirement to "cut" private sector regulations and mandates to state and local governments by 6.5% per year. A new regulatory budget would be created by having the Office of Management and Budget and the Congressional Budget Office develop separate projections of the costs of private sector regulations and of mandates on state and local governments. Congress would be required to "cut" the cost of each by an aggregate 6.5% per year.[2] A "cut" requires a change in the law itself, not simply a reduction in spending, in order to reduce the amount of regulation; thus, a "cut" is a permanent change in law. After the first year, a specified amount of the "cut" must also be made to agency personnel and administrative overhead. This will permanently change the ability of the agency to write, implement and enforce agency mechanisms (e.g., regulations) for carrying out laws.

These "cuts" would not be publicly debated; rather, Congress would make the necessary changes to public laws through the obscure budget process.[3]

- Limits on the amount of legislation each congressional committee can bring to the floor. Each committee in Congress would be given separate two-year regulatory and mandate authority (a specified dollar amount that can be spent on regulations and mandates). When the committee used up either of its two-year authority (including for existing laws), it could no longer bring a bill to the floor that causes its cap to be exceed unless three-fifths of the members vote to waive this requirement. The Budget Committee will give each committee its allocation of regulatory and mandate authority.

Thus, with the imposition of these two new regulatory budget requirements, conservatives can control the growth of new legislation and make massive change to laws without focusing attention on these activities.

- A prohibition on implementing mandates on the state and local government if the agency does not have the resources to pay for implementation of the mandate. This will seriously jeopardize enforcement of civil rights laws and regulations. There is an exemption for statutes and regulations that enforce the constitution or statutory prohibitions on discrimination. This exemption has two flaws for the civil rights community: (a) it does not apply to all civil rights concerns, but only to laws that prohibit discrimination; and (b) there is no mechanism for determining whether a regulation is intended to prohibit discrimination. For example, a recent struggle over a vocational education regulation presented claims from the public interest community that the regulation was intended to protect against discrimination, but those claims did not prevail.

This "no money, no mandate" requirement will not result in additional money being spent to carry out the mandates; rather, it will mean the undoing of hard fought legislative battles for two key reasons. First, federal discretionary spending is already very tight because of budget caps imposed since 1990 under the Budget Enforcement Act. In essence, discretionary spending is "level funded" for the next five years. In order to fund an unfunded mandate, it will require a cut in other discretionary government services. Since Republicans have indicated in the Contract with America that they intend to place greater emphasis on military spending (and the Clinton Administration appears supportive) this will make it even harder to find the resources for unfunded mandates.

Second, the Contract with America also proposes an amendment to the U.S. Constitution to balance the federal budget. If a balanced budget amendment passes, it will require an across-the-board cut of roughly 20% to government programs. If Social Security and interest on the debt are not included in the budget balancing — as is being discussed — the percentage cut would increase dramatically. And given that cuts will not be made uniformly across the entire government (e.g., increased military spending), it will mean certain programs (mostly social programs) will face massive cuts well beyond 20%, and others will be completely eliminated. Needless to say, this would not be a good environment to spend more money for unfunded mandates.[4]

- Revision of the Paperwork Reduction Act to decrease the amount of information collected by government and be more of a tool to lessen paperwork "burden" on industry. During the Reagan/Bush years, reducing paperwork burden was a euphemism for eliminating the collection of important information, such as about housing conditions on the decennial census or raced-based information on health care. Burden reduction was also a tool for undermining the agency's ability to carry out regulations: without the paperwork (e.g., reporting requirements), the regulation was rendered useless.

Under the proposed bill, OMB would be required to reduce overall paperwork burden by 5% per year for four years. OMB would give each agency a "paperwork budget" that must be followed, but would not be publicly debated. OMB's review of an agency's request to collect information would be heavily biased to reducing burdens as opposed to looking at the benefits that are derived. Special procedures would be established to allow industry to communicate with OMB in secret and to force OMB, also in secret, to review existing, approved paperwork requirements.

In addition to these changes, OMB could waive regulatory requirements in order to try out ways of reducing burdens on industry. Furthermore, OMB can ignore the public comments received during an agency rulemaking and simply disapprove the paperwork needed to carry out the regulation if OMB did not like the regulation and believed the paperwork would be too burdensome. (This would undo a civil rights protection made by Sen. Ted Kennedy (D-MA) to the 1980 Paperwork Reduction Act.) If OMB disapproved the paperwork, the agency could not carry out the regulation and would be forced to start the rulemaking over again.

- Codification of a Reagan-era Executive Order on regulatory review that was a tool used by Vice President Quayle's Council on Competitiveness and OMB to gut public protections. The proposed bill would codify President Reagan's 1981 Executive Order 12291 which granted OMB the power to review all government regulations and to determine whether the benefit of the regulation outweighed its cost as determined by OMB[5].

E.O. 12291 required an additional Regulatory Impact Analysis for "major" rules. Under the proposed bill, the definition of "major regulation" would be expanded from a regulation with an impact of $100 million or more on the economy to also include any regulation affecting 100 people or more, or any regulation that has a compliance cost of $1 million to any individual (and possibly any business). Thus, virtually all government regulations would be considered "major." Additionally, the scope of the Order would be expanded to cover all agencies by including independent regulatory agencies.

- Forcing agencies to undertake so many new analyses that it will paralyze regulatory initiatives. The bill requires a number of procedural steps agencies must undertake in order to propose a regulation. Some of the key ones include:

For major[6] rules affecting human health, safety, and environment:[7]

Agencies must conduct a risk assessment, a cost-benefit analysis, and a comparison of economic and compliance costs with the likely benefits to human health and environment. The head of the agency must certify that: (a) the risk assessment and the cost-benefit analysis are based on a scientific evaluation and are supported by the best available scientific data; (b) the rule will produce benefits that "will justify" the costs; and (c) the rule will "substantially advance" public protections as compared to the risk.

The risk assessments and cost-benefit analyses must be peer reviewed. If the peer review panel that is established by the proposed bill provided a negative recommendation, the agency must redo the assessment and analysis, and resubmit them to the panel. The panels are to include individuals with "recent professional experience with the substance" of what is being researched, but does not exclude industry scientists or those with financial interest in the issue.

As described below, risk assessments and cost-benefit analysis are a critically important civil rights issue. Who is included in the analysis and how it is conducted determine how "safe" a particular risk is and whether it should be regulated. If, for example, the risk is measured against the entire population it may miss significant danger for subpopulations or sensitive populations.

For all major rules:

Agencies will be required to conduct a regulatory impact analysis (RIA) and to publish in the Federal Register, 90 days before a proposed rule, a notice of intent to engage in a rulemaking. The notice of intent should include information about the necessity of the rule, how the rule will address the stated problem, and alternative approaches considered by agencies. The RIA itself is to be published with the proposed rule and is to include 23 items, including: the scientific basis for the rule; the economic impact of the rule; the paperwork burden of the rule; whether the rule will require the hiring of a lawyer, accountant, or engineer; an estimate of implementation costs; and whether the agency has enough money to implement and enforce the regulation.

For all rules, not just major ones:
Agencies are to conduct an analysis of the impact of the regulation on small entities, such as business and governments, to consider direct and indirect effects (a limitlessly vague concept) of the rule on the entities and whether these are significant. The Chief Counsel for Advocacy at the Small Business Administration (SBA) is to review the analysis prior to the agency publishing the rule in the Federal Register. If SBA opposes the rule, the SBA statement must be included in the Federal Register notice, along with the agency's response.

For significant regulatory actions (costing $1 million or more):

Agencies are to prepare a written statement on: (a) an estimate of the anticipated costs to state, local, and tribal governments and sources of federal funds to pay for these costs; (b) an assessment of costs and benefits anticipated from a mandate imposed on state, local, and tribal governments; (c) to the extent feasible, an estimate of the future costs of mandates, as well as any disproportionate impact the mandate or federal funding would have on particular regions, states, localities, or tribes; and (d) a description and summary of consultations with state, local, and tribal governments.

- Creation of new judicial review powers that will result in delaying agency regulatory actions. All of the above agency requirements (except the requirement for significant regulatory actions) will become judicially reviewable. This means that powerful, special interests can sue the government before the public ever sees the proposed rule in the Federal Register. These new "citizen suit" powers are in addition to already existing authority to sue an agency for rules that are issued in an "arbitrary and capricious" manner.

The proposed bill also grants private employers new rights, including "whistleblower protections." New procedures are established to protect an individual or company against government reprisals for disclosure of information that is indicative of "arbitrary" agency action, "inconsistent, discriminatory, or disproportionate enforcement proceedings," mismanagement, or many other points. Agency personnel cannot take, recommend, or approve agency actions if the disclosure of protected information was a contributing factor to the decision.

An entity subject to administrative action may assert violations of the whistleblower protections as a defense. If the violations are substantiated, the fines or other costs, except compliance costs as "required of and enforced against other persons similarly situated," will be dropped. Agencies may be assessed $25,000 a day for violations of the whistleblower protections. Additionally, the entity may file a civil action suit through which the court may cancel fines or penalties, order the rescission of settlements, issue permits or licenses that have been delayed or denied, order the agency or government employee to pay damages (for such things as loss of profits from idleness or value of a business, or payments to third parties), or order punitive damages not to exceed $25,000 per day for violations of whistleblower protections.

These new judicial review components, along with new rights, mean that even if an agency is able to slog its way through the regulatory process, it can be tied up in the courts for a very long time. Furthermore, industry can use whistleblower protections as an added mechanism to thwart agency enforcement activities.

- Creation of a new entitlement program for private property owners even as the Republicans try to cut entitlements for poor people. Final agency actions (e.g., regulation, permit, guidance) that result in a reduction in the value of property by 10% or more and places limits on the lawful use of the property will be compensated. Not only will the individual be compensated, but the agency head is required to stay the agency action.

This new private property entitlement program will likely result in less legislation and less regulation for fear that such actions might become budget-busters. Companies that must close in order to clean up toxic waste in poor communities or communities of color could potentially collect money under this new entitlement. Banks could claim a right to compensation if implementation of fair housing or community reinvestment regulations resulted in a 10% loss of profits. A candy manufacturer could get compensation from the Department of Agriculture because a new school lunch regulation limits how many sweets kids can consume in school.

If state and local governments employ this federal law, it could result in serious challenges to local zoning laws. For example, a developer might claim that a local requirement to create low- and moderate-income housing is a takings of private property since the owner could make more money by renting/selling upper-income units. The list is nearly endless on possible compensation requests that would be filed.

Many of the elements found in the Job Creation and Wage Enhancement Act[8] were previously proposed during the 103rd Congress, albeit some with slightly less strident language than that offered in this proposed bill. Nearly all failed to pass (see exceptions below). Even before the elections, most analysts expected the Congress to be more conservative and these anti-regulatory issues might be more warmly embraced. Now, with Republicans taking control of the House and the Senate, it is even more likely that these proposals will be adopted, possibly in a manner even more extreme than the bill as drafted before the national elections. The Republicans build their case for passing such extremist legislation because they claim the election was a mandate to support the Contract with America.

The underlying assumption of this anti-regulatory agenda is that what is good for Corporate America is good for all of America. The logic runs that if government protections and safeguards are reduced or eliminated, free market forces will prevail and make business flourish and create new jobs. Unlike backers of the Reagan Revolution or the Quayle Council on Competitiveness, these conservatives are not openly attacking popular government laws directly. Rather, they are using good-sounding procedural mechanisms — a regulatory budget or the balanced budget amendment — that give the impression of improved management of government but in effect will achieve the Reagan anti-governmental agenda — Reagan Redux in Disguise.

The remainder of this paper provides background on four anti-regulatory issues — unfunded mandates, risk assessment/cost-benefit analysis, private property takings, and the Paperwork Reduction Act — that dominated the debate during the last Congress. Taken together, and coupled with the other provisions in the Contract, they represent extremist proposals. The civil rights and public interest community should be wary of attempts to "compromise" on the truly radical nature of these proposals, and thereby play into the hands of conservatives. Their strategy is to propose the radical, compromise, and end up with a product that is only egregious.

I. Unfunded Mandates

A. What's the Issue?

State and local governments have been complaining that the federal government imposes significant requirements on them but does not provide enough funding to carry these requirements out. These requirements, often called unfunded mandates by some state and local government officials, fall into several categories:[9]

- Direct orders from the federal government that do not carry funding (e.g., wastewater treatment standards);
- Cross-cutting rules affecting all laws and regulations that do not carry funding (e.g., anti-discrimination and civil rights requirements, such as the Americans with Disabilities Act or Title VI of the Civil Rights Act; minimum wage levels, such as the Davis-Bacon Act); and
- Cross-over sanctions where penalties are sanctioned or federal funding is withheld in one program area to force compliance in another area (e.g., withholding highway construction funds if states do not comply with highway billboard control standards).

For some, the issue is decreasing the number of unfunded mandates. They argue that they have greater responsibilities, but less money from the federal government. For example, the U.S. Conference of Mayors promoted its opposition to unfunded mandates after the Clinton Administration failed to win passage of the stimulus package in the first months after coming to Washington. A significant portion of the stimulus package was increased funding for the Community Development Block Grant (CDBG), which provides flexible funding for communities. The loss of the CDBG funds fanned the flames within the U.S. Conference of Mayors and other trade organizations representing state and local governments, and pushed them toward stopping unfunded federal mandates. If they could not get the funds, they certainly were not going to do the federal government's work.

For others, the issue is decreasing the number of mandates that the federal government imposes, not necessarily finding the funding for them. As Thomas DiLorenzo, a professor at Loyola College in Baltimore, writes: "Let's hope that the focus of any policy reform will be on the mandates themselves rather than merely whether they are 'funded' or not."[10] These conservative forces are using the debate on unfunded mandates to attack the laws and regulations that provide public protections.

In either case, opponents of unfunded mandates strongly support legislation that would exempt state and local governments from complying with federal laws and regulations that do not provide all the direct costs for compliance. There have been two different types of legislation addressing the problem. The first, supported by Senator Dirk Kempthorne (R-ID) and Representative Gary Condit (D-CA), adopts a policy of "no money, no mandate." The second, promoted by Senator John Glenn (D-OH) and Representative John Conyers (D-MI), is a compromise that relies more heavily on procedural mechanisms to eliminate unfunded mandates.[11] Each version, along with a mandates cap, are used in the Contract with America. A brief description of each follows.

"No Money, No Mandates"

The "no money, no mandates" bill offered in the Senate by Kempthorne and in the House by Condit was widely opposed by the public interest community. More than 100 national organizations — representing the civil rights, disability, environmental, health, women's, education, children's, religious, and public interest community, as well as organizations representing working men and women — signed a letter to Congress claiming that these bills would undermine federal protections and safeguards designed to protect the health, safety, and rights of all Americans.

The Kempthorne/Condit approach was to prohibit legislation from being considered that created an unfunded mandate on state, local, or tribal governments. There was considerable criticism that their approach could not be implemented in Congress because of the way that the budget process works.[12] Accordingly, near the end of the

103rd Congress, Condit and Rep. John Mica (R-FL) proposed another approach that prohibited agencies from implementing regulations unless Congress has provided the resources to pay for the mandate. This approach was an attempt to achieving the "no money, no mandate" objective without running afoul of the appropriations/authorization processes. It is the Condit/Mica approach that is in the Job Creation and Wage Enhancement Act.

The Glenn/Kempthorne Compromise

Glenn and Kempthorne worked together to fashion a compromise in the Senate. Their bill became the basis for a compromise, led by Conyers and Rep. Clinger (R-PA) in the House. The Glenn/Kempthorne bill, with minor modification, also appears in the Job Creation and Wage Enhancement Act.

For all legislation containing unfunded mandates, the Congressional Budget Office (CBO) must report on whether or not the amount of the unfunded mandates exceeds $50 million (adjusted annually for inflation) in any of five years. If it exceeds $50 million, CBO must identify an estimate of the total direct costs to the state, local, and tribal governments to comply with the bill, the amount of increase in authorization of appropriations needed to offset the unfunded mandate, and the amount appropriated in the prior fiscal year. If CBO determines it is "reasonably feasible," it will also estimate the future costs of mandates, as well as any disproportionate impact the mandate or federal funding would have on particular regions, states, localities, or tribes.

All legislation that contain mandates would be subject to two points of order, each overcome by majority vote. (NOTE: In the Job Creation and Wage Enhancement Act, only in the Senate can the point of order be waived by majority vote. There is no waiver provision in the House.) A point of order could be raised on whether the CBO statement is included in the committee report. And a point of order could be raised on whether the bill raises authorization of appropriations to a level at least equal to the direct cost of the mandate as estimated by CBO and has "identified in the bill" a mechanism for offsetting the increased authorization of appropriations. The offset is to be some combination of reducing authorization of appropriations or entitlement spending, or increasing federal receipts.

Although not subject to a point of order, the committee report is also to contain a statement on whether the committee intends the mandate to be partly or entirely unfunded, along with whether the bill is intended to preempt state, local, or tribal law, and, if so, an explanation of why the committee supports preemption. The committee report is also to contain a "qualitative, and if possible, a quantitative" assessment of costs and benefits anticipated from the mandate, and list sources of federal assistance in meeting the direct costs of the mandate.

The bill also creates executive branch procedures that attempt to reduce the burden of federal regulations on state, local, and tribal governments. For all "significant" federal mandates, agencies must develop procedures to provide these governmental entities "meaningful and timely input in the development" of regulations. Consultations with officials of small governments are required before establishing any requirements or regulations.

For every "significant regulatory action" — defined as costing state, local, or tribal governments at least $100 million (adjusted annually for inflation) — agencies are required to prepare a written statement on:

- An estimate of the anticipated costs to state, local, and tribal governments and sources of federal funds to pay for these costs;
- A "qualitative, and if possible, a quantitative" assessment of costs and benefits anticipated from the mandate;
- To the extent feasible, an estimate of the future costs of mandates, as well as any disproportionate impact the mandate or federal funding would have on particular regions, states, localities, or tribes; and
- A description and summary of consultations with state, local, and tribal governments.

The written statement is to be prepared prior to issuing proposed and final rules. Thus, state, local, and tribal governments are afforded special access to agencies, exalting them above any portion of the public. This is particularly troublesome when this special access is prior to the agency issuing a proposed rule; in essence, before anyone else has an opportunity to shape agency action.

In the Senate, Byron Dorgan (D-ND) successfully added an amendment to the Kempthorne/Glenn bill that requires the CBO analysis to be applied to legislation affecting the private sector. The private sector CBO analysis would not, however, be subject to a Senate point of order. The Dorgan amendment also does not impose procedural requirements on the executive branch. The Dorgan amendment is included in the Job Creation and Wage Enhancement Act.

What's A Mandate?

The Job Creation and Wage Enhancement Act does not use the same definition of mandate throughout its requirements. Under the "no money, no mandate" provisions, an unfunded mandate includes any requirement on state or local governments to undertake an activity or provide a service, and for which the federal government does not provide sufficient resources to undertake or provide the service or activity. Additionally, entitlement programs of $500 million or more that impose costs on state or local governments or would cause a reduction in federal resources if the government failed to undertake the activity or provide the service are also considered unfunded mandates. Requirements to enforce constitutional rights and prohibitions against discrimination are excluded.

Thus, any grant-in-aid program would be covered under the "no money, no mandate" provisions. This would include requirements under grant or contracts, such as reporting requirements. It would also include minimum wage laws, Medicaid, and nearly every other government program.

Under the Kempthorne/Glenn approach, it remains unclear precisely what is considered a mandate. The bill provides greater detail on definitions than the "no money, no mandate" section, but, in doing so, raises a number of questions. According to this part of the bill, a mandate is a provision in any bill or regulation that:

- Creates an enforceable duty, except as a condition of federal assistance or where there is voluntary participation;
- Lowers authorization of appropriations that is intended for compliance with the mandate; or
- Affects an existing entitlement program that provides at least $500 million per year to state, local, and tribal governments by increasing the stringency of participation or placing caps on (or otherwise lowering) spending and is a program for which the state, local, or tribal government lacks authority to control their financial or programmatic responsibilities.

The bill excludes a provision in a bill or regulation that:

- Enforces Constitutional rights of individuals;
- Prohibits discrimination on the basis of race, religion, gender, national origin, or handicapped or disability status;
- Requires compliance with accounting and audit procedures;
- Provides for emergency assistance or relief at the request of state, local, or tribal governments;
- Is necessary for national security or implementation of international treaties; or
- The President and Congress designate as emergency legislation.

Unlike the "no money, no mandate" section, this section seems to exclude grant-in-aid programs in which the state, local, or tribal government voluntarily participates. Also the costs associated with carrying out the grant cannot be considered an unfunded mandate.

For both sections of the bill, some may consider civil rights programs protected because of the exemptions. However, there are at least three concerns: (1) In the Kempthorne/Glenn approach, the requirement to identify offsets to pay for the unfunded mandate does not exclude civil rights programs; (2) While laws intended to prohibit discrimination are excluded, other programs of concern to the civil rights community are included in the definition of mandates; and (3) There is enormous ambiguity as to what constitutes a law intended to prohibit discrimination.

While the Congressional Parliamentarian may be able to determine whether a bill should be excluded or not, who will determine regulatory exclusion? For example, regulations on supplemental vocational education services ran into the unfunded mandates buzzsaw this last summer. School administrators and local education agencies argued that the rules would force states and school districts to spend more money to carry out the regulations unless additional federal funding was provided. On the other side, low-income students, along with organizations such as the National Puerto Rican Coalition, argued that the regulations are basic civil rights. If these exclusions became law, who would decide whether the regulations should be exempt from providing the funding or not?

B. What's the Clinton Record?

President Clinton acknowledged the importance of not imposing additional unfunded mandates on states and localities. The National Performance Review recommended a presidential directive to limit the use of unfunded mandates by the executive branch.[13] Within two months, President Clinton issued Executive Order 12875, "Enhancing the Intergovernmental Partnership," which was intended to reduce unfunded mandates on state and local governments.[14]

The Order prohibits agencies, to the extent feasible and permitted by law, from implementing regulations that create mandates on state and local governments unless:

- There are funds necessary to pay the direct costs incurred by the state or locality; or
- The agency meets with the affected governmental units and documents to OMB the nature of the governmental unit's concerns along with justification for issuing the regulation.

The Order also gives agencies enormous flexibility in granting requests to states and local governments for waivers of statutory and regulatory requirements.

Although the Administration may have hoped that the Order would ease the concern about unfunded mandates, the reverse happened. With the loss of the stimulus package, the U.S. Conference of Mayors began organizing around unfunded mandates. The trade groups representing state and local governments, often called the Big Seven, began working closely with Kempthorne on his "no money, no mandate" legislation.

The Clinton Administration opposed legislation proposing "no money, no mandate." As the Senate marked up the Kempthorne/Glenn "compromise" bill, Leon Panetta, then OMB Director, sent a letter supporting the bill with the exception of the Dorgan private sector amendment. As the 103rd Congress was concluding, the President endorsed and lobbied for the Glenn/Kempthorne and the Conyers/Clinger bills, including the private sector amendment.

Although the Clinton Administration opposed the "no money, no mandate" approach, it did not oppose such language being added to the reauthorization of the Elementary and Secondary Education Act (ESEA). The ESEA was enacted with an amendment initially proposed by Sen. Gregg (R-NH) that prohibits the federal government from "mandat[ing], direct[ing], or control[ling] a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."

The Clinton Administration has not taken a position on other unfunded mandates provisions offered in the Job Creation and Wage Enhancement Act, including:

- A cut of 6.5% in the costs of mandates imposed on state and local governments, along with a cap on the cost of unfunded mandates held to 3% of the GDP; and
- A requirement that the Advisory Committee on Intergovernmental Relations prepare a study on unfunded mandates with recommendations on such things as what unfunded mandates to terminate. The ACIR would also be responsible for monitoring the implementation of the "no money,

no mandate" requirements and the procedural mechanisms to stop passage of laws with unfunded mandates.

II. Risk Assessment/Cost-Benefit Analysis

A. What's the Issue?

Assume a parent is repeatedly hitting a child in the head. Which do you think would be better? Assess how much damage the parent can inflict without doing serious harm to the child. Or, find a way to stop the parent from hitting the child.

If you selected the second approach, the public interest community argues you should side with them regarding a highly contentious issue that continues to come up in Congress — risk assessment. They say that while risk assessment can be a useful tool in selected cases, the objective should not be solely to determine how much exposure to a hazard can occur without serious consequences. Rather the main objective should be to avoid the hazard in the first place — to require an analysis of alternatives to the risk itself.

Sounds logical, but industry representatives and conservative lawmakers say that the example is a bad one. They say the real issue is that the government, faced with limited resources, must do a better job of setting priorities (e.g., should lead or asbestos be safeguarded against) and of focusing on problems that pose the greatest risk. In their view, risk assessment is a useful management tool that Congress should require of every major regulation affecting health, safety, and environment.

These different perspectives have created a showdown in Congress, with lawmakers offering amendments to require risk assessments and comparative risk analysis and the public interest community fighting to get them off the bills. The victims of the battle during the 103rd Congress have been nearly every major environmental bill. For example, the bill to make EPA a cabinet level department died because of a potential risk assessment amendment. A number of other bills died either because of risk assessment amendments or because the risk assessment amendment was one of several problems concerning the bill. An environmental technologies bill, and the reauthorization of the Safe Drinking Act, Clean Water Act, and Superfund all died. Only one bill, the reorganization of the U.S. Department of Agriculture, passed with risk assessment language as part of it. Even a bill on risk assessment, which had the endorsement of EPA and the environmental community, died when Rep. Robert Walker (R-PA) added restrictive amendments.

The Job Creation and Wage Enhancement Act contains language similar to that proposed by Senator J. Bennett Johnston (D-LA), the original author of these risk assessment amendments. Industry representatives have agreed to make a big push to pass such language. They have bankrolled a new organization, the Center for Uniform Risk Evaluation, to fight for these amendments. The National Association of Manufacturers has also begun to weigh in on these issues, along with conservative think tanks such as the American Enterprise Institute and the Cato Institute. All these groups are working closely with a House regulatory reform coalition led by Rep. Tom DeLay (R-TX) as well as a newly formed Senate regulatory task force chaired by Sen. Don Nickles (R-OK).

Risk assessment is the characterization of the potential adverse health effects of human exposures to hazards. According to the National Research Council, risk assessment involves four basic steps[15]:

- Hazard identification, which means deciding if a chemical is linked to a particular health effect;
- Dose-response assessment, which asks the question: What is the relation between the level of exposure (dose) and the incidence of disease (response)? In other words, how much of a chemical will make you how sick. This stage involves extrapolating from high doses to predict incidence at low doses and converting animal doses to equivalent human doses;
- Exposure assessment, which measures the frequency, duration, and intensity of human exposure to a hazard; and

- Risk characterization, which tries to measure the expected risk, as well as its certainty. For example, there is a 95% probability that 1,500 of every million citizens will get cancer from the dioxin they get from meat, fish, and dairy products.

Risk assessment is a mathematical technique to determine what is "safe." Government agencies use it for many things, including to determine: how much toxic or radioactive waste is safe to leave in the ground at a Superfund site; whether a new incinerator will impose "acceptable risks" in a neighborhood or city; how much dioxin is safe for the bald eagles and the salmon in the Columbia River Basin; and to decide whether to protect workers from exposure to certain workplace hazards. It is also used to assess food safety. In many respects, risk assessment lies at the heart of the environmental justice movement and other civil rights issues. If risks are considered low, agencies will not regulate or enforce.

Risk assessment issues have usually been left to scientists and technocrats debating in academic centers. But recent discussions about risk assessments have had little to do with science, instead focusing on risk assessment as a political tool for slowing down government regulation.

In the Senate, Johnston offered an amendment which passed 95-3 that would require EPA to estimate the risk for every regulatory action, conduct a comparative analysis of the risk addressed by the regulation relative to other risks to which the public is exposed (Johnston's personal favorite is that of being hit by lightening), and estimate the cost of implementation of and compliance with the regulation. The Johnston amendment also required the head of EPA to certify that: the regulation would substantially advance public protections against the identified risk; the best available scientific data was used to make the estimates; and the benefits of the regulation will justify the costs.

In theory, risk assessments and comparative risk analyses sound like appropriate solutions to prioritizing dangers faced by the public. In fact, in a recent survey conducted by the Harvard Center for Risk Analysis,[16] 83% of the 1,000 respondents felt that the government should use risk analysis to identify the most serious environmental problems and give them the highest priority.

The same survey, however, also resulted in 66% of the respondents stating that the government is not doing enough to protect the public from environmental pollution, and 76% said that, when scientists are unsure about how harmful pollution is, environmental regulations should be designed to err on the side of safety, even if that makes regulations more expensive. In general, the American people believe that the role of the government is to protect them from risks they cannot control themselves.

Environmentalists have raised many problems with the Johnston amendment. They point out that risk assessment is not a precise science, allowing regulators simply to "plug in the numbers." Indeed, experts point out that the science involved in conducting risk assessments can be dubious, and that relying solely on risk assessments can be very dangerous.[17] Risk assessments start with built-in uncertainties that may result in findings that are different by several orders of magnitude. For example, in determining the risk of a chemical, the agency may conduct research that focuses on estimates of inhalation because of an assumption that the most common form of ingestion is breathing the chemical. The result may show low risk. Another study of the chemical's risk may focus on edible products (instead of air transmission) and find that risk to humans is very high.

The underlying assumption makes an enormous difference. Scientists must make assumptions in nearly all aspects of the risk assessment. For example, the relationship between dose and response at low levels of exposure is not well known. Thus, scientists must make judgment calls about the dose-response relationship in order to complete the risk assessment.[18]

Equally important is the agency's decision on how to treat the risk estimate. Averaging the risk across the whole population may yield a very different interpretation of the data than if it is averaged across subsectors that face high exposure.

The result may be not to regulate even though certain highly exposed communities may face illnesses and deaths that could be prevented. This issue has very practical consequences. Will the government offer protection to all consumers from pesticide residues in food, or will it protect only the person who eats the theoretically "average" diet? Will workers be afforded protection in all industries, or will certain workplace risks be condoned as unavoidable or too expensive to eliminate? Will toxic pollution be measured in low-income and minority communities in order to assess the need to regulate or will the measure be based on the "average" community? When put this way, risk assessment suddenly becomes a civil rights issue.

Another controversial part of the Johnston amendment is the requirement to conduct a comparative analysis of the risk addressed by the regulation relative to other risks to which the public is exposed. Johnston stated: "[T]he purpose of the risk comparison is ... to give members of the public some understandable reference points so that they can grasp the magnitude of the risk posed. Most of us cannot immediately grasp the meaning of a 10^{-6} chance of dying from a particular ailment. But if we can compare that risk to three other common risks, such as the risk of dying from lung cancer, the risk of dying in a car accident, and the risk of being hit by lightning, we can have some idea of what the scientists are talking about."[19]

Again, it sounds reasonable and logical. But there are several problems with the comparative risk analysis language. First, the amendment would allow comparing involuntary risks (e.g., pesticide residues on fruits) with voluntary risks (e.g., driving without a seatbelt or smoking cigarettes). The risk associated with smoking cigarettes or not using seatbelts greatly exceeds the estimated risk from consuming fruit with legal pesticide residues. However, when a risk is beyond the control of the consumer, the individual's estimate of a tolerable risk level is typically much more conservative.[20] Furthermore, what does the public gain if EPA tells us that the risks associated with smoking cigarettes (which is a voluntary risk) are far greater than pesticide residues on fruits we eat (which is an involuntary risk). Does that "comparative risk" fact lessen the dangers of the pesticide? Environmentalists feel that EPA should be required to regulate when there is a serious risk, regardless of how it stacks up to other risks. That principle should be applied to all environmental, health, and safety risk assessments.

A second concern is that the comparative risk analysis may imply a level of certainty that does not exist. Typically, the data available for assessing chemical risks is much less certain than data associated with, for example, driving without seatbelts, especially if the risk posed involves a chronic effect such as carcinogenicity. Yet the risk assessment amendments do not direct EPA to set standards that incorporate margins of safety to allow for imperfect and incomplete data. Neither does any provision in the Job Creation and Wage Enhancement Act.

A third concern is that the comparative risk analysis avoids the confrontation of important policy considerations. For example, there is no consideration for the distribution or equity of costs and benefits. There are often geographic, economic, racial, and temporal discrepancies between those who bear the costs and those who benefit.

Acknowledging some of the concerns, Johnston reworked his bill and offered a revised version on the reauthorization of the Safe Drinking Water Act. "Johnston II" had several improvements over "Johnston I." Instead of applying risk assessments to every environmental regulation, it would be limited to rules with an impact on the economy of $100 million or more. Instead of requiring EPA to estimate the risk (which connotes a quantitative approach), it requires EPA to "describe" the risk (a broader, more qualitative approach). It also requires EPA to review the impact to subpopulations and sensitive groups — a critical justice issue. The requirement to estimate the cost was changed to consider the cost and benefits and to include quantitative and qualitative factors.

On the other hand, Johnston II was worse than Johnston I in its comparative risk requirement. It required EPA to compare the risk with six other risks, three of which are to be regulated by the government and three that are not to be regulated by the government.

The same language as Johnston I was offered this summer by Rep. Gary Condit (D-CA) as an amendment to the USDA reorganization bill. After considerable procedural wrangling and negotiation, the bill with a modified Condit amendment was enacted. The environmental community opposed the compromise as being too extreme. Johnston, along with conservative lawmakers, opposed the compromise as too weak and promised to offer stronger language in the next Congress.

While the debate over the Condit amendment was occurring, the House Committee on Science, Space, and Technology was preparing for a mark-up of H.R. 4306, the Risk Assessment Improvement Act. The public interest community and EPA endorsed the bill with minor modifications. Unfortunately, at the mark-up, conservatives launched an attack on the bill. For example, Rep. Walker (R-PA) proposed an amendment that made risk assessment guidelines unreasonably vulnerable to judicial challenge. Another amendment established the use of assumptions and procedures that would make it more difficult to protect health and the environment, particularly for minority and low-income populations. In the end, the bill died.

As described in the overview of this paper, the Job Creation and Wage Enhancement Act requires agencies to conduct a risk assessment and cost-benefit analysis for virtually all government regulations affecting human health, safety, and environment. The provisions provide no clarification about analyzing the impact on subpopulations or sensitive populations; nor do they address the importance of non-quantitative analysis of risk and cost-benefit.

Perhaps even more important is that the proposed Act forces the debate to be around the wording for requiring risk assessments. This misses the point. Peter Montague, an environmental activist and expert on risk assessments, describes it succinctly: "We don't need to get rid of risk assessment completely. But we need to precede it by assessing alternatives. Then risk assessment could be applied to each of the alternatives, to select the least damaging."[21] Montague points out that the National Environmental Policy Act, the law that requires environmental impact statements, already has a model for doing "alternatives assessments," but that the idea needs to be dusted off and reused.

Montague and other scientists and policy experts have begun to organize in response to the industry's actions to promote the risk assessment agenda. They have created a new organization, called the Science and Environmental Health Network (SEHN), to educate the public about issues such as risk assessment. Additionally, a coalition of environmental, health, and other public interest groups, along with organizations representing working men and women, has begun to emerge to counter the industry lobby force on risk assessments and other anti-regulatory issues.

B. What's the Clinton Record?

Slightly more than a year ago, President Clinton signed Executive Order 12866, "Regulatory Planning and Review."[22] Among its requirements is that agencies are to "consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction." More recently, a White House committee has been developing principles and guidance to agencies on how to handle risk assessments. That process has not involved the public and its impact on the legislative process is unknown.

The Clinton Administration opposed the Johnston I amendment, but became less vocal after the amendment passed 95-3 in the Senate. The Administration had virtually no voice after the rule to consider the EPA cabinet elevation bill was surprisingly defeated in House. The battle over the rule was in part a debate over whether the House should vote on the Johnston I amendment. The Rules Committee decided the Johnston I amendment was not germane to the bill.

As Johnston II was developing, the Administration worked with the Senator to develop language. The Administration claims it did not support the final Johnston II language, but took no action to keep it from being attached to the Senate version of the Safe Drinking Water Act.

It is unclear what position the Administration took with regard to the Condit risk assessment language attached to the USDA reorganization bill. Initially, the White House and EPA indicated little support for the Condit amendment. But as negotiations proceeded, the Administration did little to prevent its passage. The Administration, along with the USDA, made it clear that they considered passage of a USDA reorganization bill a very high priority. In the end, the President signed the USDA reorganization bill with a modified Condit risk assessment amendment.

The Job Creation and Wage Enhancement Act goes way beyond the Condit compromise language in the USDA reorganization bill. The difficulty in determining the Clinton Administration's position on these proposals is that there is no "point person" on these issues. Generally, by default, the public interest community has communicated with the Administrator of OMB's Office of Information and Regulatory Affairs. But these communications have not translated in a coordinated Administration response.

III. Private Property Rights

A. What's the Issue?

"Takings" legislation requires the government to compensate businesses or property owners whenever laws, regulations, or other governmental actions result in diminished profits or property values. Proponents of "takings" legislation would require government bureaucracies to perform extensive, nationwide studies of the potential property/profit impact of an action before the government can undertake the action. Proponents of takings legislation would redefine traditional American property rights and undermine health, safety, and environmental protections, civil rights, property rights, and other rights of average citizens. A broad range of public safeguards would be blocked by unworkable red tape, flawed standards, and requirements that taxpayers pay corporations and individuals not to pollute, put lives in danger, or deny civil rights.

The Fifth Amendment to the U.S. Constitution says that private property may not be taken for public use without just compensation. The U.S. Supreme Court has ruled that a regulation can result in a Fifth Amendment "taking," but whether this happens depends on a number of considerations. The Court has also affirmed that "takings" cases must be decided on the facts of each particular case.

In 1988, President Reagan signed Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, which required that all regulations comply with a "takings" standard that the Congressional Research Service has since demonstrated to be contrary to the Constitution as interpreted by the Supreme Court. The Order required the Justice Department to certify that each agency had a procedure for reviewing whether proposed regulations had a takings implication, and instructed agencies to submit a Takings Impact Assessment with regulations sent for review to the Office of Management and Budget. If the Justice Department did not certify the agency, then the agency could not issue regulations. If OMB did not find that the specific regulatory proposal was consistent with the President's policies and priorities, then the agency could not proceed with the regulatory action.

The hope was that regulatory protections could be reviewed for takings implications and potentially stopped.[23] Reagan Administration Solicitor General Charles Fried identified Attorney General Edwin Meese as the source of the Order. He had a "specific, aggressive, and it seemed to me quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal regulation of business and property."[24]

Conservatives have pushed to either codify the Reagan Order or to enact legislation that would require payment for actions that fall far short of being takings.[25] (Such legislative initiatives have also been advanced at the state and local level. During the November national elections, a takings referenda — not nearly as extensive as the Job Creation and Wage Enhancement Act — was defeated in Arizona.)

Takings legislation would have a cross-cutting impact, potentially undermining important laws. For example, would a business designated as a Superfund site that is required to shutdown for clean-up argue that the regulation created a takings since there would be a loss of business? For that matter, would a zoning law requiring new apartment buildings to reserve 10% of the units for low- to moderate-income families become a taking since the owner loses "property value" because of the regulation?

The primary concern is that the takings argument is little more than a smokescreen for an outright assault on citizen protections and safeguards. Ironically, even though proponents of takings legislation argue they represent small property owners, their "takings" initiatives primarily would benefit only one side of the equation — major corporate and development interests, not individuals.

During the last Congress, Rep. Billy Tauzin (D-LA) and Sen. Richard Shelby (R-AL) introduced the Private Property Owner's Bill of Rights (H.R. 3875/S. 1915), which was substantially like the provisions in the Job Creation and Wage Enhancement Act. Like the proposed Act, they would have created an entitlement program to permit property owners to be compensated whenever governmental actions have the impact of reducing the value of the property by 10% or more.

Not only would the Tauzin/Shelby approach impose a major new burden on taxpayers, it would actually undermine balanced private property rights by eviscerating protections provided in existing law against pollution and other risks to the public health and safety, and by placing the alleged rights of one property owner above those of others.

In the last Congress, Sen. Bob Dole proposed a more modest approach that the Tauzin/Shelby one. Even the Dole plan would gridlock the government under inflexible paperwork requirements that are virtually impossible to satisfy. The Dole proposal would require:

- All agencies to complete a private property taking impact analysis before issuing or promulgating "any policy, regulation, proposal, recommendation (including any recommendation or report on proposal for legislation), or related agency action" which could result in a taking or diminution of use or value of private property;
- Each of these analyses to include "an estimate of the reduction in use of value of any affected private property as a result of such" agency action;
- All agencies, "to the greatest extent practicable, [to] transmit a copy of such analysis to the owner or any other person with a property right or interest in the affected property."

Not only would this put the government into the title search business, it would require the notification of every potentially affected corporation's shareholders! As almost everything the government does could diminish the value or use of someone's rights in private property, the government would be precluded from entering into treaties, negotiating tariffs, changing interest rates, taking actions to protect civil rights or to protect health and safety, or engaging in health care and welfare reform, without first analyzing the potential impact on every person with a conceivable property right and notifying all those persons.

Thus, even if the Job Creation and Wage Enhancement Act were made less radical, the alternatives could create government gridlock also.

B. What's the Clinton Record?

When the Clinton Administration issued its regulatory review Executive Order (E.O. 12866) on September 30, 1993, the President announced that the Administration would review other related executive orders including the Reagan E.O. 12630 on takings. At several points, the Administration appeared close to rescinding the Reagan Order and replacing it with a Clinton Order. However, the Administration has not yet rescinded or replaced the E.O. 12630.

The Clinton Administration has opposed the Tauzin/Shelby approach and the Dole plan for addressing takings. Despite its opposition, it has not forcefully presented its position on Capitol Hill.

IV. Paperwork Reduction Act

A. What's the Issue?

The proposed Job Creation and Wage Enhancement Act includes under Title V a reauthorization of the Paperwork Reduction Act (PRA). The PRA was supposed to be reauthorized in 1989, but reauthorization has stalled each year, primarily because of regulatory issues. The PRA is an important behind-the-scenes law since it grants powers to the Office of Management and Budget to control what information is collected by the government, including information required by regulations. At the end of the 103rd Congress, the Senate passed the PRA after considerable controversy; the House took no action.

Sen. Sam Nunn (D-GA) had introduced a bill on behalf of a coalition of business interests, including the Chamber of Commerce and the National Federation of Independent Business. The bill also had the backing of the Senate Small Business Committee. However, the authorizing committee, Governmental Affairs Committee, chaired by Sen. John Glenn (D-OH), did not completely agree with the bill. Glenn worked with Nunn to fashion a compromise bill. The public interest community, led by OMB Watch and Public Citizen, testified that the "compromise" bill was actually nothing of the sort.

The PRA reauthorization bill in the Job Creation and Wage Enhancement Act is closer to the original Nunn bill than to the so-called compromise. The bill gives OMB the authority to review "paperwork" requests from the federal government that are not physically collected by the government. This includes warnings on food safety labels (or any other labels for which the words are not specified by statute), workplace health and safety notices, emergency planning information collected by Local Emergency Planning Committees, information about Head Start employees and other child care providers, and much more. This part of the bill overturns a 1990 Supreme Court decision (*Dole v. Steelworkers*) that made clear that OMB did not have the authority under the PRA to review such paperwork.

The bill also requires a 5% per year reduction for four years in the amount of information collected by the government. Each agency would receive, after consultation with the agency, an annual information collection budget from OMB that ensures a 5% reduction in aggregate governmentwide information. This "budget" would not be subject to congressional approval or public debate.

The bill places a heavy emphasis on reducing the burdens associated with the collection of information. The art of balancing the burden reduction with the benefits derived from the information collection is virtually lost in the bill. This will mean that OMB and internal agency reviews will have to follow the new tilt, emphasizing burden reduction. Overall, the bill views all information collection as bad, rather than as an essential activity of a responsive and responsible government.

Furthermore, the bill would give OMB authority to waive regulations or administrative directives in order to allow agencies to pursue pilot projects intended to improve information management practices, such as lowering collection burdens on industry. The public would have the right to be notified about the waivers, but not to comment.

The proposed bill would substantially modify an amendment offered by Sen. Ted Kennedy to the original 1980 PRA law. The "Kennedy amendment" was intended to safeguard civil rights protections from OMB intrusions; over the years, it has been used to protect virtually all paperwork required by regulation, such as environmental, consumer, and worker protections. The Kennedy amendment allows OMB to comment on the paperwork associated with a proposed rule, but not to approve or disapprove it. The agency must respond to the OMB comments in the final rule. If procedural steps are missed or the agency does not reasonably respond to the OMB comments, OMB may then disapprove the paperwork.

Under the proposed PRA reauthorization in the

Job Creation and Wage Enhancement Act, the Kennedy amendment would be eviscerated. It gives OMB the final authority to approve or disapprove the collection of information, even after the final rule has been published. Thus, if OMB does not agree with the final rule (which must be consistent with public comment) and believes the paperwork is too burdensome, it can force the agency to re-enter rulemaking by disapproving the paperwork.

The proposed bill grants unusual "public participation" powers that will likely be used very effectively by business. First, any communication with OMB can now be done in secret if "the disclosure of which could lead to retaliation or discrimination against the communicator." In other words, if someone in the private sector felt that burden was unreasonably being placed on them, they can communicate in secret with OMB in order to avoid retaliation from a specific agency.

Second, any individual can request OMB conduct a review of an existing collection of information to determine whether it lacks "practical utility," is the least burdensome approach, or has been approved by OMB. OMB would have 60 days to complete a review of the request (unless a notice of extension is made to the requesting individual). The results of the review are to be made public upon request unless the requesting individuals requests secrecy.

These last two "public participation" requirements create an entirely new secret, unaccountable operation for the handling of information collection requests. This runs counter to the openness procedures under the PRA since the law passed in 1980.

Dissemination of Government Information

The proposed bill addresses ways of "enhancing agency responsibility for sharing and disseminating public information" that, if implemented, would greatly restrict the public's right-to-know. First, the bill requires OMB to review agency dissemination activities to determine whether they are consistent with a new set of standards for dissemination. These standards include whether the agency:

- Has balanced the usefulness of disseminating the information with the objective of minimizing the cost to the government and the public;
- Ensures the public has "timely, equitable, and cost-effective access." Past standards were limited to timely and equitable; cost-effectiveness, coupled with the first point, places a much heavier emphasis on user fees. The proposed bill indicates that user charges can be set at a level "sufficient to recover the cost of dissemination;" there is no limitation to indicate that the cost of collecting and preparing the information for dissemination is not be included as part of the user fee. User charges can exceed the cost of dissemination if the information is for the "benefit of a specific identifiable group."
- Considers whether there is another product "available from other Federal or non-Federal sources [that] is equivalent to an agency information dissemination product and reasonably achieves the objectives of the agency." This provision, considered but dropped from the Senate-passed PRA bill, is highly controversial. Originally, the provision was one of several criteria that an agency should consider when disseminating; it was not conceived of as threshold question to determine whether to disseminate — and it was not intended as a criterion for OMB reviews. Even in its original version, many considered this provision tilting heavily to privatizing government dissemination responsibilities.
- Takes advantage of all available opportunities in "discharging responsibilities" for disseminating information. The bill mentions "Federal and non-Federal, including State and local governments, libraries and private sector entities." Combined with the equivalency test (see above), this criteria may be used to emphasize the "discharging responsibilities" to further privatize government information.
- Creates opportunities to receive public input so that dissemination activities meet public needs.
- Provides notice of initiating, substantially modifying, or terminating significant dissemination products.

Thus, like paperwork review, OMB would now be given specific authority to review each dissemination activity. Presumably, without OMB authority, the agency may not proceed since the bill specifically states that OMB shall develop "policies and practices for agency dissemination".

Finally, the bill only applies to information dissemination "products," but does not define what a product is. This is important for a number of reasons, not the least of which is that the bill requires an inventory of all agency information dissemination products. This inventory is to be made available through electronic and other means "at no charge to the public".

B. What's the Clinton Record?

The Clinton Administration testified before the Senate Governmental Affairs Committee that it could support either the Nunn bill (which is the basis for the bill in the Contract with America) or the Glenn/Nunn compromise. At a Senate hearing before the Governmental Affairs Committee, the Administration chose not to discuss specific provisions in either bill.

On dissemination, the Administration has gone substantially beyond the provisions in the Job Creation and Wage Enhancement Act. In the summer of 1993, OMB issued a revision of Circular A-130, Management of Federal Information Resources, which fundamentally reversed the Reagan/Bush views on dissemination of government information.

The revised Circular changes the policy from requiring "maximum feasible reliance on the private sector" for dissemination of information to permitting agencies, within the context of their mission, to "distribute information at the agency's initiative, rather than merely responding when the public requests information." It was untenable to allow principles of the marketplace to be the primary standards by which to evaluate and control information in the public sector. If such principles were to hold sway, public information would disappear as private businesses decided particular products or services were not sufficiently profitable.

The new Clinton policy gave agencies an affirmative responsibility to disseminate information, not merely a passive obligation — and it emphasizes use of newer information technologies to facilitate dissemination. Unfortunately, the new Circular only provides guiding policy; it does not have specific suggestions on how to pursue a public access agenda or how to relate public access to the National Information Infrastructure, commonly called the information superhighway. Additionally, the Circular has no enforcement mechanisms tied to it.

On December 7, 1994, OMB issued a bulletin to agencies to implement a Government Information Locator System (GILS). GILS is to provide the public with an inventory of agency information holdings through computer telecommunications, mostly designed for Internet. GILS is an enormous first step in fulfilling a governmentwide right-to-know agenda. However, it falls far short of providing public access to government information in that it does not cover all information holdings (mostly just electronic information) and only provides information about the information. It does not provide direct access to the information itself. In some respects, GILS is a disappointment because of a missed opportunity to debate a plan for meaningful public access to government information. At the urging of the public interest community, OMB is expected to publish a notice of inquiry in the *Federal Register* about a comprehensive, governmentwide dissemination system using newer information technologies.

Even as OMB's efforts fall short, Circular A-130 has resulted in a number of exciting agency initiatives to promote public access to government information. Four examples — access to EPA's Toxic Release Inventory (TRI), placing the SEC's EDGAR database on the Internet, HUD's initiative to provide fair housing/fair lending data, and initiatives to make White House activities publicly available — are briefly described.

EPA's Right-to-Know Initiatives

The public interest community has been working with the Environmental Protection Agency since passage of the Emergency Planning and Community

Right-to-Know Act in 1986 around implementation of the law. The law mandates manufacturing facilities to report on estimated releases to the land, water, and air of roughly 300 toxic chemicals. EPA is required to make this Toxics Release Inventory (TRI) available "through computer telecommunications and other means to any person ..." It remains the only law that mandates electronic public access to information and has been held as a model for other agency action.

OMB Watch's working relationship with EPA and our monitoring of implementation of the law has resulted in the RTK NET, the Right-to-Know Computer Network[26], which was cited in the National Information Infrastructure Agenda for Action report, the Administration's blueprint for the information superhighway. RTK NET was established because the public interest community was dissatisfied with the manner in which EPA pursued the TRI online public access requirement. Indeed, after EPA officials saw RTK NET in operation, they also were dissatisfied and entered into a partnership with the public interest and philanthropic community to fully implement RTK NET.

Interestingly enough, because of RTK NET's success, EPA is now interested in expanding the right-to-know principles to other parts of the agency in order to pursue environmental justice concerns, improve enforcement initiatives, and generally empower the public to be more involved in monitoring regulatory compliance. Some of these ideas, however, are met with bureaucratic unease; the culture for inaction is still very real.

Access to SEC Data

A new project has been initiated to provide public access to information gathered through the Security and Exchange Commission's (SEC) Electronic Data Gathering, Analysis and Retrieval System (EDGAR). The EDGAR database currently is operated by Mead Data Central (operators of Nexis/Lexis) under contract to SEC. Access to the database is limited and very expensive.

The public access project, undertaken by the New York University Stern School for Business and funded by the National Science Foundation, is developing and demonstrating ways to post large government data archives on the Internet for access by researchers and the general public. The goal of the project is to develop techniques that can be used directly by government agencies and other information providers, giving these organizations the tools and knowledge to allow them to place government information on the Internet. A secondary goal is to make key financial archives from the SEC available to those who would not otherwise have access to the information.

This type of project was unheard of not more than two years ago. The creation of the EDGAR database was a hotly contested issue, with the public interest community complaining that "privatizing" government information would limit public access. Nonetheless, EDGAR was consistent with the previous OMB Circular A-130, received the blessing of the Bush Administration, and had the strong backing of the information industry which stood to profit from the initiative.

HUD's Fair Housing/Fair Lending Project

This project is being launched by HUD as a public access experiment intended to empower community groups in their struggle to build sustainable communities. Initially the focus will be on community economic development, fair housing, and fair lending concerns and will make data obtained under the Home Mortgage Disclosure Act (HMDA) and the American Housing Survey (AHS) available through computer telecommunications, including the Internet. HUD has initiated an agreement to place the information on RTK NET and will encourage a partnership with philanthropy to support the experiment.

The project is significant for several reasons. First, HUD will be the first agency to voluntarily provide a significant electronic public access project (beyond statistical databases) without being required by law (EPA is required by the 1986 law). Second, the project is a bold statement since HUD is an agency with a tight budget; resources are precious. Putting money into this public access project is an acknowledgement of the long-term economic and societal savings that can be achieved with small investments. HUD is gambling that the NII is a significant piece of reinventing government and that it must act now.

White House Public Access Initiative

The White House has launched an initiative, available through the Internet, to provide access to all the President's and Vice President's speeches, press releases, and other notices about White House actions. These are posted almost immediately.

The new service uses the most sophisticated aspects of the Internet. For example, the President, Vice President, and Socks the Cat welcome you with a voice message. Of course, you must have the appropriate equipment on your end to hear the voices.

This White House initiative is also linked to FedWorld, which is operated by the Department of Commerce. Agencies can contract with FedWorld to place information holdings on the system. Increasingly, more and more agencies are beginning to do so.

V. General Recommendations to the Clinton Administration

We recommend for each of the following issues:

Mandates: The President should oppose any initiative that embraces a "no money, no mandate" approach. The Administration should address the fiscal constraints faced by cities and states by proposing in the FY 1996 budget several new blocks that provide funding to be used flexibly by state and local governments to address major unfunded mandates as mutually agreed upon (e.g., environment, public works, and health). The block grants could be paid for by cutting various tax expenditures and loopholes.

Risk Assessments: The President should focus the debate on finding alternatives to the risk instead of solely on assessing the risk. Analyses, such as risk assessments and cost-benefit analyses, should not be uniformly required throughout government. Rather, requirements for such analyses should be made through the respective authorizing legislation, and should only apply to significant rules.

Private Property Rights: The President should issue an affirmative statement indicating his support for protecting private property rights for all Americans, not just corporations as the Republicans propose. This could be done through an Executive Order. The President should strongly oppose the creation of a new entitlement for private property owners.

Paperwork Reduction Act: The President should support reauthorization of the PRA, but should oppose the proposed reauthorization in the Contract with America. The President should oppose provisions to overturn the *Dole v. Steelworkers* Supreme Court decision, to impose an automatic, across-the-board 5% cut in the amount of information that government collects, and to tilt the paperwork review process heavily in favor of industry by placing "burden" above "benefit." Communications between non-governmental employees and the Office of Management and Budget regarding the review of paperwork should never be done in secret.

Regulatory Budget: The President should strongly oppose this provision in the Contract with America as it is a backdoor approach to eliminating or seriously weakening federal laws and protections essential to the civil rights community.

Overall, the President would be well-advised to:

1. Speak out early and forcefully on these issues. If the President decides to veto a bill that contains unacceptable provisions, he cannot afford to leave the impression that he is the cause of gridlock. By speaking out early and forcefully on these issues, he can more clearly articulate what he supports and why he supports it. In this way, it is possible that he can shape the outcome of congressional action. And, if he cannot shape the outcome, the public will come to understand the difference between the Clinton Administration's goal of improving the quality of government and the Republicans' goal to dismantle it.
2. Identify a point person within the Administration

to address these issues. It would be helpful to delegate to the Administrator of the Environmental Protection Agency the "point" responsibility since it has a significant regulatory responsibility, is knowledgeable about all the issues presented in the Job Creation and Wage Enhancement Act, and is a focal point of attack by conservatives. The point person should coordinate activities within the Administration and provide a response to the public and Congress.

3. Use agency experts to educate Congress about these technical issues. Most Members of Congress are only vaguely familiar with these administrative procedure issues. Correcting misimpressions and explaining the impact of various proposals will give Members a better understanding of the pending legislative proposals. It will also give Members a better understanding of the ongoing work within agencies.
4. Veto any legislation that would have the effect of undoing federal protections and safeguards. The conservative agenda includes weakening or eliminating the Civil Rights Acts, the Americans with Disabilities Act, the Community Reinvestment Act, and other laws. This cannot be allowed to happen.

Endnotes

[1] *See* Washington Post, December 2, 1994, "In Regulatory Assault, GOP Has a Lot to Be Tankful For," by Cindy Skrzycki, pg. D1.

[2] The bill contradicts itself on various provisions and the Republican staff have not been able to clarify a number of points; in fact, they have added to the confusion. For example, the bill seems to imply that the 6.5% cut would stop once private sector regulations cost less than 5% of the GDP and public sector mandates less than 3% of GDP. However, the Republican staff indicate that the 6.5% cut is to occur every year for seven years regardless of the overall cost of regulations and mandates. If this is true, it is unclear why the cuts would stop after seven years, since the bill calls for a 6.5% cut in each budget year without any ending date.

[3] It is unclear exactly how this would be done. The bill requires the changes to be made through the Budget Resolution. Since the Budget Resolution is not an enacted law, the Resolution sets out reconciliation directives to committees to make changes in laws. The committees' actions are bundled into an omnibus budget reconciliation bill. The proposed bill excludes the reconciliation process, making it uncertain how the "cuts" would be made. It appears that the Budget Committee would move its own bill without seeking the input from committees of jurisdiction.

[4] There have been proposals to add to the balanced budget amendment or to move separately another constitutional amendment that prohibits unfunded mandates. These proposals, which are not currently in the Contract with America, would not provide any exemptions, such as for enforcing statutes to prohibit discrimination.

[5] E.O. 12291 was rescinded on September 30, 1993 when President Clinton replaced it with another order, E.O. 12866, Regulatory Planning and Review. Although neither the public interest community nor industry has ever strongly endorsed the Clinton E.O., it also has never been criticized by either community. For example, at a Senate Governmental Affairs Committee hearing (May 19, 1994), there was very little negative comment about the Order by any witness. In contrast, Reagan's E.O. 12291 was strongly criticized during many congressional hearings. Many reports provided evidence that the Office of Management and Budget used its powers under the Order to influence, if not control, the substance of agency regulations. Even as the Order was lambasted by the public interest community, industry applauded the Order and encouraged the role of OMB as well as Vice President Quayle's Council on Competitiveness to act on behalf of industry concerns.

[6] "Major" refers to the expanded definition which includes any regulation affecting 100 or more people. Thus, virtually all government regulations would be included.

[7] Health and safety reports, along with other types of agency information, would be subject to these new requirements.

[8] For a complete analysis of the proposed bill, *see* OMB Watch's "Eye of the Newt: An Analysis of The Job Creation and Wage Enhancement Act," prepared November 29, 1994.

[9] Described in *Coping with Mandates,* edited by Michael Fix and Daphne A. Kenyon (The Urban Institute: 1990).

[10] Thomas DiLorenzo, "Unfunded Federal Mandates: Environmentalism's Achilles' Heel?" World Capitalism Review (Winter, 1994, pg. 22).

[11] Kempthorne worked with Glenn in developing a compromise in the Senate. In the House, Conyers worked with Rep. Bill Clinger (R-PA), ranking minority on Conyers Government Operations Committee, to develop a compromise to the Condit version.

[12] The problem is that the appropriations process is on a different track than authorization of laws. So

while Congress may consider legislation (done through the authorization process) and it may want to ensure there is no unfunded mandate, there would be no way to implement it (done through the appropriations process).

[13] National Performance Review, *Creating a Government that Works Better and Costs Less*, U.S. GPO, September 7, 1993, pg. 37.

[14] The Executive Order was signed by President Clinton on October 26, 1993.

[15] National Research Council, *Risk Assessment in the Federal Government: Managing the Process*, 1983. The NRC has been updated periodically, but the definition of a risk assessment has not changed.

[16] Harvard Center for Risk Analysis, "Risk in Perspective," Vol. 2, No. 1, January, 1994.

[17] Mary O'brien, "Facing Down Pesticide Risk Assessments," Global Pesticide Campaigner, Vol 4, No. 1 (March 1994).

[18] *See* for example, Rodericks, Joseph V., *Calculated Risks*, 1992. Rodericks describes the use of a linearized multistages model to infer cancer risk at low doses. Others have explored the controversy over the methodology, raising concerns as to whether the results are overly conservative or not.

[19] Statement of Senator J. Bennett Johnston before the Subcommittees on Environment, Energy and Natural Resources, and Legislation and National Security, of the House Committee on Government Operations, February 1, 1994, pg. 3.

[20] *See,* for example, M. Granger Morgan, "Risk Analysis and Management," in Scientific American, July 1993, pg. 32-41.

[21] Peter Montague, "The Hidden Cost of Risk Assessment," Economics & Environment, Vol. 3, No. 3 (Fall 1994), pg. 3.

[22] E.O. 12866, Regulatory Review and Planning, September 30, 1993. The Order is carried out by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. The Administrator of OIRA is Sally Katzen.

[23] The Order places special restrictions on protection of public health and safety even though health and safety regulations seldom, if ever, have been found to be takings. This takings assessment is without regard to the statutory mandates that underlie federal health and safety activities.

[24] Charles Fried, Order and Law: Arguing the Reagan Revolution — A Firsthand Account, 1991, New York: Simon & Schuster.

[25] There have been several attempts to codify the Reagan Order. Lead by former Sen. Steve Symms (R-ID), an amendment has twice passed the Senate only to be thwarted on procedural grounds in the House. In the Senate, Sen. Bob Dole (R-KS) has taken over Symms' leadership role. In the House, Rep. Billy Tauzin (D-LA) has led the charge.

[26] RTK NET is jointly operated by OMB Watch and Unison Institute, a non-profit organization providing assistance to government agencies and non-profit organizations on use of newer information technologies. RTK NET is a free service.

Chapter VI

The Clinton Record on Judicial Nominations at Mid-Term

by Elliot M. Mincberg[1]

I. Introduction

The first two years of the Clinton Administration have witnessed a significant and positive change with respect to the selection of judges for the federal bench. Diversity in judicial nominations has improved dramatically; for example, while only one out of every 12 nominees during the Reagan-Bush years was non-white, the percentage of minorities nominated by President Clinton is more than 30%[2] Quality appears to have risen as well; for example, a higher percentage of Clinton nominees than Reagan-Bush nominees have prior judicial experience and have been rated as "well qualified" by the American Bar Association.[3] The total number of federal judicial vacancies, which stood at over 110 when President Clinton took office, has been cut in half.[4] And while a considerable number of nominations controversies took place during the Reagan-Bush years as concerns were raised about "ideological litmus tests" for conservatives, including over Supreme Court nominees Bork and Thomas, only two of 142 Clinton nominees have even necessitated a contested vote on the Senate floor, and both these nominees (to the federal courts of appeal) received more than 60% of the Senate's vote.[5]

Much more clearly remains to be done, particularly in light of the record of the previous 12 years of judicial nominations. Following the November, 1994 elections, moreover, ominous warning signs have begun to appear. Some conservative activists have vowed that when Republicans assume control of the Senate in 1995, it will be "the dawn of a new day", in which the President will be pressured to nominate more conservative nominees in the mold of the Reagan-Bush years or will face significant nominations controversies.[6] Others maintain that President Clinton's nominees have already been both centrist and very well-qualified, and that no such problems should occur.

This chapter will assess the Clinton Administration's record in nominating judges for the federal bench. First, it describes the procedures used by the Administration to select candidates, including a comparison with the procedures utilized by President Bush. Second, it analyzes President Clinton's record in making nominations, including such factors as quality, diversity, and experience, again including a comparison with previous administrations. Finally, the chapter will discuss the outlook for judicial nominations over the next several years and offer suggestions to help promote excellence, diversity, and commitment to equal justice in the federal judiciary.

II. The Clinton Administration's Nomination Procedures

Statistically, the Clinton Administration got off to a relatively slow start on judicial nominations; for example, the number of judicial vacancies at the end of the Administration's first year was almost the same as when the President took office.[7] During that time, however, Administration officials also set up the process for judicial nominations, including coordinating input from Democratic Senators and other officeholders who had little or no input during the previous 12 years.

A. Criteria for Selection

Although the Administration has not publicly articulated a set of specific criteria for selecting judicial nominees, it appears to be seeking to follow the guidelines articulated by President Clinton before he took office. Prior to his election, the President acknowledged the extremely low number of women and minorities appointed as judges by Presidents Reagan and Bush, and expressed his intent to increase diversity. In addition, he stated that he would seek to appoint as judges "only men and women of unquestioned intellect, judicial temperament, broad experience, and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."[8] By most accounts, such criteria have been communicated, at least in general terms, to Administration officials, Senators, and others participating in the selection process.

B. Overall Methods of Selection

The method used by the Administration to select nominees has varied with the level of the judicial post involved. At the district court level, where the President has nominated 119 judges, the Administration has primarily followed the historical practice of "senatorial courtesy". This generally involves the senior Democratic Senator from the state with a judicial vacancy recommending between one and three candidates for the position. If a vacancy occurs in a state with no Democratic Senator, the recommendation is made by the ranking Democrat in the House of Representatives delegation from the state, the Governor, the Representative from the specific area, or another official selected in consultation with the White House. Candidates are screened, with the Justice Department assuming the lion's share of the responsibility, and the President makes the final selection.

Under the Clinton Administration, there appears to be less insistence than under previous administrations that Senators recommend three potential candidates for each vacancy, and the Administration is more willing to permit one name to be submitted. At the same time, however, the Administration clearly reserves and at times exercises the right to reject recommended nominees after careful review. Perhaps the most public example concerned a state court judge who was recommended by then-House Majority Leader Gephardt for a federal district court judgeship in Missouri. Serious concerns were raised with respect to the qualifications and conservative judicial philosophy of the potential nominee, particularly in such areas as civil rights and the right to privacy, and the recommendation ultimately was withdrawn at the request of the White House.[9]

President Clinton has made 21 nominations thus far to the federal courts of appeal. As under the Bush Administration, the White House reserves for itself a larger role in finding and selecting nominees. The Office of Counsel at the White House plays a major role in this area. Input is received from a variety of sources, including Senators and other officeholders. For example, as discussed in further detail below, the Administration's two most controversial courts of appeal nominees were both recommended highly by respected Democratic Senators in their home states.

The President has nominated two Supreme Court justices so far — Justice Ruth Bader Ginsburg and Justice Stephen Breyer — both of whom were confirmed with little controversy. Although the Justice Department has played some role, most of the responsibility in this area has been exercised by the White House itself. In addition to the White House Counsel, advice has been provided by other top White House officials, including the Chief of Staff and the First Lady who, as an accomplished attorney, has also offered input on other judicial selection matters. By all accounts, the President himself has played a particularly active and personal role in the selection process at the Supreme Court level.

One clear change under the Clinton Administration has been increased consultation with Republican as well as Democratic Senators prior to the selection of nominees. This has most evidently taken place at the Supreme Court level, where Senator Orrin Hatch, then ranking Republican on the Senate Judiciary Committee, was informally consulted, and supported both nominees.[10] White House Counsel Abner J. Mikva has noted in general that Senators from both sides of the aisle have been consulted on nominations, and that the process is not and "shouldn't be" as "partisan" as some have suggested.[11]

C. Investigations and Interviews

1. The Justice Department and the White House

As under prior administrations, both the Justice Department and the White House are involved in the extensive process of investigating and interviewing candidates for the federal bench. The activity at the Justice Department is centered in the Office of Policy Development, headed by Assistant Attorney General Eleanor D. Acheson. Acheson's staff is responsible for the formidable task of researching the past record of potential nominees, including prior writings and court decisions. They also interview candidates, particularly for district court judgeships. Attorney General Janet Reno and other department officials also participate in the process.

At the White House, the focal point for judge-related activity is in the Office of Counsel. Initially, former Senate Judiciary Committee Counsel Ron Klain played the leading role in the White House Counsel's office. Klain has subsequently become Counselor to the Attorney General, and Victoria Radd has assumed his former function at the White House. Important responsibility has also been exercised by White House Counsel Mikva and his predecessors. Although it plays some role with respect to district court judges, the counsel's office focuses more specifically on court of appeals and Supreme Court vacancies. Continuing the practice under the Reagan-Bush Administrations, the counsel's office meets periodically with other White House and Justice Department officials to discuss pending vacancies and candidates.

2. The American Bar Association

During the first two years of the Clinton Administration, the American Bar Association, through its Standing Committee on the Federal Judiciary, has continued its traditional role of reviewing and evaluating the qualifications of nominees for the federal bench. The Committee seeks to determine the views of a candidate's peers concerning his or her professional competence, judicial temperament, and integrity. A Committee member conducts an investigation in the judicial circuit in which the vacancy exists, including a large number of confidential interviews with attorneys, judges, and others in the community. The nominee is also interviewed and given an opportunity to respond to any adverse information. Candidates are rated "well qualified," "qualified", or "not qualified", with some candidates receiving mixed ratings from divided ABA panels.[12]

During the Reagan and Bush Administrations, conservatives and administration officials criticized the ABA and effectively pressured it to revise its guidelines to avoid any reference to a candidate's political or ideological philosophy. Some observers have contended that the ABA's voice was largely muted by threats to exclude it from the nominations process.[13]

Over the last few years, the ABA has been criticized for several very different reasons. Initially, due largely to the significant number of vacancies and relatively small number of attorneys serving on the ABA Committee, concerns were expressed about the slowness of the ABA evaluation process, which in turn slowed down the nomination and confirmation processes. By all reports, this situation has improved over the past year.

In addition, however, particularly as the President began to nominate significantly more female and minority candidates than his predecessors, concerns were expressed that in some cases the ABA undervalued less "traditional" forms of experience and gave undeserved poor ratings to some minority and female candidates. In a highly publicized case, the ABA assigned a "not qualified" rating to Alex Williams, who was then state's attorney in Prince George's County, Maryland, and was nominated to the federal district court bench. Civil rights leaders and organizations, as well as Republicans and Democrats in Congress, joined in criticizing the unfavorable ABA's rating and in raising concerns. Despite the ABA rating, Williams was overwhelmingly confirmed.[14]

III. President Clinton's Record of Judicial Nominations

During his first two years in office, President Clinton made 142 nominations to the federal bench: two to the Supreme Court, 21 to the courts of appeal, and 119 to the district courts. All but three appellate nominations and 11 district court nominations were voted on by the Senate, and all of these were confirmed.[15] In 1994, 101 district and appellate court judges were nominated and confirmed, representing the highest number in any year since 1979.[16] Although none of President Clinton's appointees has been on the bench long enough to fully evaluate the results, and although improvements can be made, the record so far indicates that the President has taken important steps towards meeting his pre-election pledges to improve the diversity, quality, and commitment to equal rights of nominees to the federal bench.

A. The Overall Record

As Senior Judge Leon Higginbotham has written, a diverse judiciary is important to ensure that litigants "benefit from the experience of those whose backgrounds reflect the breadth of the American experience", and to help ensure that the federal bench is "both substantively excellent and respected by the general population."[17] President Clinton's record represents clear progress in this key area.

For example, in twelve years under Reagan-Bush, only 23 African Americans were nominated as federal judges, representing less than 4% of the total number selected. In two years, President Clinton has already nominated 31 African Americans, more than one-fifth of those nominated. Compared with Presidents Bush, Reagan, or Carter, President Clinton has significantly improved the racial and ethnic diversity of the bench, at least with respect to African American and Hispanic nominees. President Clinton has appointed only one Asian American judge (.7% of the total), compared with one (.4%) under Bush, two (.5%) under Reagan, and two (.8%) under Carter.[18]

Progress has also occurred with respect to gender diversity. Although he has served only two years, President Clinton has already nominated more female judges than any other President. More than 30% of his nominees have been women.[19]

Measured by such factors as prior public experience with the court system and ABA ratings, President Clinton's nominees have also fulfilled his pledge to appoint highly qualified individuals to the federal bench. More than 53% of Clinton nominees on whom complete information is available have prior experience as a state or federal judge or federal magistrate, almost 43% have worked as state prosecutors or in U.S. Attorney's offices, and more than 9% have been public defenders. This compares favorably with the record under President Bush.[20] In addition, 63% of President Clinton's nominees were rated "well qualified" by the ABA, a higher percentage than under Bush (52%), Reagan (53%), or Carter (57%).[21]

Many of President Clinton's nominees have also demonstrated a personal commitment to civil and constitutional rights. Based on an analysis of Senate Judiciary Committee questionnaires available on 138 nominees, 40 or 29% were employed during their careers in a legal aid agency, public defender office, or civil rights organization or agency such as the EEOC or the Lawyers' Committee on Civil Rights. Far fewer judicial nominees under President Clinton than under President Bush have ever belonged to clubs that currently or previously had discriminatory membership practices, and those that did reported that they resigned as a result or worked to change club rules.[22]

Even a brief recitation of the backgrounds of some of the individual judges selected by the President illustrates their impressive backgrounds and their personal commitment to civil and constitutional rights. The President selected David Tatel, former director of the Office of Civil Rights at HEW and head of the Lawyers' Committee for Civil Rights, as a judge on the influential Court of Appeals for the D.C. Circuit. He elevated Judge Pierre Leval, widely reputed as an excellent, progressive jurist, to the Second Circuit. He chose African American state judge Michael Davis, formerly a commissioner on the Minnesota Civil Rights Commission, as a Minnesota federal judge. And he selected D.C. Circuit Judge Ruth Bader Ginsburg, who formerly taught at Columbia Law School and directed the ACLU Women's Rights Project, to serve on the Supreme Court.

The available record also suggests that while President Clinton's nominees have been of high quality and generally more progressive than under Presidents Reagan and Bush, they have not been subjected to an ideological "litmus test." As Professor Sheldon Goldman of the University of Massachusetts has commented, President Clinton has sought to "lower the ideological temperature" of the selection process, his nominees are "clearly not as far to one side of the spectrum as the Bush and Reagan appointments," and there is "no indication that candidates have undergone the kind of ideological scrutiny that went on under the Bush and Reagan Administrations".[23] For example, despite the Administration's pro-reproductive choice policy, the President nominated a district court judge in Wyoming who has reportedly spoken out personally against abortion rights.[24]

In fact, some have criticized the Clinton Administration for not acting more vigorously to nominate more ideologically progressive candidates, noting that President Clinton has not nominated a person of color to the Supreme Court. For example, a progressive California judge appointed by President Carter has publicly stated that "[t]hose of us who have waited three decades for a Democrat to be appointing liberal judges, particularly to the Supreme Court, have been deeply disappointed."[25] In testifying on the Supreme Court nomination of Justice Breyer, the Coalition of Bar Associations of Color suggested that "it is imperative that the [Supreme] Court's diversity include a forceful progressive intellectual voice emanating from someone steeped in the reality of the day-to-day experiences of average Americans, particularly people of color," and stated that it would have "preferred that President Clinton" had helped make the court more reflective of the nation's diversity.[26] Overall, as Ralph Neas of the Leadership Conference on Civil Rights has concluded, the President has generally selected "progressive, non-ideological nominees who've commanded bipartisan support."[27]

B. Controversial Clinton Nominees

Although a few right wing advocates have attacked even Clinton nominees such as Justices Ginsburg and Breyer who were supported by the Republican leadership on the Senate Judiciary Committee, only two nominations by President Clinton have resulted in any significant controversy. Even the nominations of these two judges, Rosemary Barkett and H. Lee Sarokin, were approved by more than 60% of the Senate.

1. Rosemary Barkett

In 1993, President Clinton nominated Judge Rosemary Barkett, then chief justice of the Florida Supreme Court, to the federal court of appeals for the Eleventh Circuit. Barkett had served on the state court bench for 14 years, including six years on the state supreme court, prior to which she had worked as a practicing attorney and, before that, as a nun teaching in Catholic schools. Rated unanimously "well qualified" by the ABA and recipient of numerous awards and honors, her nomination received strong bipartisan support from officials such as Democratic Senator Bob Graham, Republican Senator Connie Mack, the state attorney general, and the general counsel of the state Republican party.[28]

Nevertheless, Barkett's nomination was vigorously attacked, first by D.C.-based conservative groups such as the Free Congress Foundation and writers in the conservative *Human Events* and *Washington Times*, and then by Republican Senators as well.[29] Based largely on arguments unsuccessfully used by the National Rifle Association and other groups to attempt to defeat Barkett in a regularly scheduled state retention election for supreme court justices, opposition focused on the facts of a handful of cases in which she had voted to reverse death sentences. In what some observers termed a new conservative "litmus test" on the death penalty, advocates maintained that such cases demonstrated she was "soft on crime" and a poor choice for the bench.[30]

The attack on Barkett was answered by strong supporters across the political and ideological spectrum. Statistics revealed that Barkett had voted with the state supreme court majority in more than 90% of her cases. She voted to affirm the death penalty in more than 200 cases, including several in which the majority of the U.S. Supreme Court, including Reagan appointees Anthony Kennedy and Sandra Day O'Connor, voted to overturn the death sentence. She received firm support from the National Association of Police Organizations and the state Fraternal Order of Police, as well as from the state chapters of the NAACP, NEA, and American Association of University Women. Her decisions exhibited a firm but fair philosophy on criminal justice issues, as well as a recognition of the importance of protecting constitutional and civil rights in such areas as freedom of religion, reproductive choice, and free expression.[31]

Ultimately, the attacks on the Barkett nomination were unsuccessful. Although Barkett's confirmation was delayed for several months and Senate Republicans insisted on a debate on the Senate floor, she was confirmed in April, 1994 by a bipartisan vote of 61 to 37.[32]

2. H. Lee Sarokin

In 1994, President Clinton nominated Judge H. Lee Sarokin of the federal district court in New Jersey for a seat on the Third Circuit court of appeals. A former law professor and private lawyer, Sarokin had served on the federal trial bench since 1979. Twice named as chair of the National Conference of Federal Judges, he was rated unanimously "well qualified" by the ABA, and received the support of both New Jersey senators, every living former chief judge of the Third Circuit, and four former New Jersey U.S. Attorneys, both Republican and Democratic. His reputation was that of a careful jurist who had demonstrated a clear recognition of the importance of constitutional and civil rights.[33]

As with Judge Barkett, the attack on Judge Sarokin was led by right wing groups and focused on the crime issue. In particular, opponents claimed that Sarokin had improperly granted a writ of habeas corpus to "free" a convicted "cop-killer" in a New Jersey case. Opponents also concentrated on a 1992 decision by the Third Circuit to remove Sarokin from a cigarette product liability case, claiming that the decision demonstrated that he is not fair and impartial.[34]

Led by Senator Bradley, supporters of Judge Sarokin responded vigorously. Sarokin was endorsed by law enforcement organizations in New Jersey, such as the State Troopers Fraternal Association. Critics' charges in the habeas corpus case, it was discovered, had ignored the fact that the state supreme court reversed the criminal conviction on the very same grounds that led Judge Sarokin to grant the habeas petition. (Indeed, the petitioner in the habeas case later filed a defamation suit claiming that Sarokin's critics had knowingly and falsely claimed that he was a "cop killer" whose conviction was never overturned.) With respect to the tobacco case, supporters explained that the Third Circuit had specifically praised Sarokin for his "outstanding" judicial temperament and rejected the suggestion that he could not discharge his judicial duties fairly, but removed him only because of strong language he had used in an opinion criticizing tobacco companies which might raise questions about the appearance of impartiality. In fact, the author of the Third Circuit opinion, who has since retired, specifically supported Sarokin's nomination and praised him for his "fairness, justice, and impartiality."[35]

As with Judge Barkett, Judge Sarokin's nomination was delayed and then debated on the Senate floor, but was approved by a bipartisan vote.

Republicans such as Senator Alan Simpson joined in confirming Judge Sarokin by a 63-35 margin.[36]

The Washington Post aptly summarized both the Sarokin and Barkett nominations in the overall context of President Clinton's record on judicial nominations:

> In both contested cases, the nominees were clearly qualified and experienced. And neither was an ideologue, in spite of opponents' claims. Reciting the horrible details of any crime is a senseless way to demonstrate the bias of a judge, because it tells nothing about the guilt of the defendant or the due process he received at trial. If the details of a few cases these nominees handled in the past were the only issues opponents could raise against the Clinton administration's slate this year, the president's record looks like a good one.[37]

IV. The Outlook for the Future

Although clear progress has been made over the past two years with respect to nominations to the federal judiciary, the outlook for the future is somewhat uncertain. Immediately following the November elections, in which Republicans assumed control over the Senate, conservative activists have raised the specter of significant opposition to the President's nominees. A number of specific nominees whose nominations remained pending when the Senate adjourned, along with several rumored nominees, have been named as possible right-wing targets, and potentially enhanced general scrutiny and opposition based on such issues as crime and reproductive rights has been suggested. Republican control of the Judiciary Committee has raised the possibility of additional delay in acting on nominations, and some observers have suggested that the President will either be forced to nominate more conservative judges or to wage many more confirmation battles. As one observer has noted, incoming Judiciary Committee chair Orrin Hatch "is certain to face increasing pressure from conservative advocacy groups who now hope he will bear down on any nominees that attract their attention as too liberal."[38]

In addition, the need for continued expeditious action to fill vacancies on the federal bench remains high. As of December 1, 1994, there were 15 appellate and 45 district court vacancies on the bench, including 22 classified as "judicial emergencies" because the positions have been open for at least 18 months.[39] The Judicial Conference, moreover, has recommended that 46 judgeships be added to help cope with rising demands on the federal judicial system.[40]

Particularly under these circumstances, it is critical that the new Republican leadership in the Senate fulfill its responsibility to process nominations fairly and expeditiously. The Senate in general, and the Judiciary Committee in particular, has established a clear record of bipartanship in this area. Although some nominations during the 1980s did produce controversy as the Senate exercised its constitutional function of advice and consent, the vast majority were approved expeditiously and with few if any objections, even when the Senate was controlled by Democrats and Republican presidents were nominating primarily conservative judges.[41] Now that the shoe is on the other foot, similar treatment of President Clinton's nominations is clearly warranted. This is particularly crucial in light of the continuing need to fill judicial vacancies; if both parties are truly interested in fighting crime and doing justice, a fully staffed judiciary is essential.

To accomplish these objectives, it is similarly crucial that the Administration continue and further improve its nominations efforts. The change in Senate leadership should not result in delay or hesitation in making nominations. Efforts to promote diversity should continue, with additional attention paid to Asian-Americans and any Supreme Court vacancies that occur. In addition, the Administration should strive even harder to submit nominations which truly fulfill the President's pledge to protect equality and constitutional rights.

It would be naive to suggest, of course, that political considerations play no role whatsoever in judicial selection. But political considerations may well support similar conclusions. For example, although conservative Republican candidates attempted to attack incumbent Senators for supporting Judges Barkett and Sarokin in recent Senate races, particularly in Massachusetts, California, and Virginia, all three of these challenges failed.[42] Experience over the past several years documents that when an Administration stands firmly behind quality candidates questioned or attacked on ideological grounds, particularly with the aid of a strong Senate sponsor or supporter, the result generally has been successful.[43] In addition, the Administration's approach over the past several years, which includes more effective advance consultation with the Senate, nomination of progressive, centrist candidates with generally excellent qualifications, and no "litmus test," has clearly helped to make judicial nominations less political and confrontational than during the previous twelve years. Hopefully the future will see persistent and enhanced efforts by the Administration to fully meet President Clinton's objectives in nominating federal judges.

Endnotes

[1] Special thanks are extended to Melissa Goldberg, administrative assistant and field coordinator at People For, for her invaluable research and administrative assistance.

[2] *See* White House, *Clinton Administration Judicial Record* (Oct. 8, 1994) ("White House Report") (reflecting 45 non-white nominees out of 142 total judicial nominees by President Clinton, or 31.7%); People For the American Way, *The First Year of Federal Judicial Nominees by President Clinton* (Dec. 16, 1993) ("PFAW 93") at 2 (reflecting 50 non-white nominees out of 617 total judicial nominees by Presidents Reagan and Bush, or 8.1%). For purposes of consistent comparison with prior administrations, one nomination in the White House report (to the Federal Circuit) is not included in the totals as discussed in this chapter. Totals also do not include other specialized courts such as the Court of International Trade.

[3] *See* White House Report; PFAW 93; Unpublished statistics compiled by People For the American Way from Senate Judiciary Committee for 1993-94 ("PFAW 94").

[4] *See* PFAW 93 at 4 (noting 113 vacancies as of Feb. 1, 1993); White House Report (noting 53 vacancies as of October 8, 1994, when Senate completed work on nominations for 1994).

[5] *See* E. Mincberg & D. Wollin, *Judicial Nominations: Reflections on the Past; Suggestions for the Future,* in Citizens' Commission on Civil Rights, *New Opportunities: Civil Rights at a Crossroads* 201 (1993) ("CCCR 93"); J. Liss & K. Whitney, *Judicial Nominations: Continuing the Struggle for Equal Justice,* in Citizens' Commission on Civil Rights, Lost Opportunities 185 (1991) ("CCCR 1992"); *Washington Post* (Oct. 12, 1994) at A22.

[6] *See* LEGAL TIMES (Nov. 14, 1994) at 6 (quoting Clint Bolick of Institute for Justice).

[7] *See* PFAW 93 at 4.

[8] *See* ABA Journal (Oct. 1992) at 57.

[9] *See* ST. LOUIS POST-DISPATCH (June 6, 1993) at B1,7; ST. LOUIS POST-DISPATCH (April 19, 1994) at A1,6. The suggested nominee was Judge Gary Gaertner.

[10] *See* B. Robertson, *Are Clinton Nominees Doing the Supreme Court Shuffle,* Insight (July 25, 1994) at 16-17.

[11] LEGAL TIMES (Nov. 14, 1994) at 6.

[12] *See* Tyler, *In Defense of the ABA's Rule in Rating Nominees,* Legal Times (Nov. 9, 1992) at 27, 37.

[13] *See* Hon. Roger J. Miner, *Advice and Consent in Theory and Practice,* 41 Amer. U. L. Rev. 1075, 1082 (1992); Aron, *Grass-Roots Power and Judicial Selection,* Chicago Tribune (May 8, 1991) at 27.

[14] *See* WASHINGTON POST (Aug. 9, 1994) at B1, B5; WASHINGTON POST (Aug. 12, 1994) at B1, B2; WASHINGTON POST (Aug. 18, 1994) at A1, A16.

[15] *See* White House Report.

[16] Administrative Office of the U.S. Courts, *The Third Branch,* (Nov. 1994) ("Third Branch") at 5.

[17] Higginbotham, *The Case of the Missing Black Judges,* New York Times (July 29, 1992) at A21.

[18] *See* PFAW 93 at 2; White House Report. Specifically, more than 21% of Clinton's nominees have been African American, compared with around 6% under Bush, just over 2% under Reagan, and around 14% under Carter. Approximately 8% of Clinton's nominees were Hispanic, compared with 4.7% under Bush, 3.4% under Reagan, and 6.2% under Carter.

[19] *Id.* Specifically, President Clinton has nominated 44 female judges, compared with 41 by President Bush, 31 by President Reagan, and 40 by President Carter.

[20] *See* PFAW 93 at 3; PFAW 94 statistics. Specifically, 53.6% (74 of 138) Clinton nominees have prior judicial experience, compared with 47.7% under Bush. 42.8% (59 of 138) Clinton nominees have prosecutorial experience, compared with 46% under Bush. 9.4% (13 of 138) Clinton nominees have public defender experience, compared

with 2.5% under Bush.

[21] *See* White House Report.

[22] *See* PFAW 93 at 3; PFAW 94 statistics. Specifically, 75 (31.4%) of Bush nominees reported that they belonged to discriminatory clubs, including several who maintained their memberships until specifically questioned on the subject by the Senate Judiciary Committee. Available questionnaires reveal that the number dropped to 30 of 138 (21.7%) under Clinton, and they generally indicated that they had either resigned prior to nomination or worked to change club policies.

[23] S. Labaton, ***President's Judicial Appointments: Diverse, But Well in the Mainstream,*** The New York Times (Oct. 17, 1994) ("NYT") (quoting Prof. Goldman).

[24] *Id.* (discussing nomination of Judge William Downes).

[25] NYT (quoting Judge Reinhardt).

[26] Statement of the Coalition of Bar Associations of Color concerning the nomination of Judge Stephen Breyer to the Supreme Court before the Committee of the Judiciary of the United States Senate (July 15, 1994) at 5,3.

[27] Legal Times (Nov. 14, 1994) at 6.

[28] *See* People For the American Way Action Fund, ***The Appellate Court Nomination of Rosemary Barkett: The Right Wing Attack and the Factual Record*** (1994) ("PFAWAF Report") at 1.

[29] *See, e.g.,* "Clinton Names Crime Coddler to Key Federal Appeals Court," Human Events (Oct. 23, 1993) at 1, 17; "The Injustices of Justice Barkett," Washington Times (Oct. 25, 1993); P. Galley, "Right Wing is Recycling Old Garbage," St. Petersburg Times (Oct. 19, 1993) (discussing attacks by Free Congress Foundation); "Dole Joins Battle Against Barkett Nomination," Human Events (March 11, 1994) at 3.

[30] *Id. See also* PFAWAF Report; N. Lewis, "GOP to Challenge Judicial Nominees who Oppose Death Penalty," New York Times (Oct. 15, 1993).

[31] *See* PFAWAF Report; "Barkett in the Mainstream," Orlando Sentinel (Oct. 25, 1993); "Who's Right About Barkett? D.C., NY Conservatives or Us?", Tallahassee Democrat (Oct. 21, 1993).

[32] *See* Washington Post (Oct. 12, 1994) at A22.

[33] *See* People For the American Way Action Fund, ***Judge Sarokin: Thomas Jipping's Claims and the Facts*** (1994) ("Sarokin Report") at 1; Congressional Quarterly Weekly Report (Oct. 8, 1994) at 2886.

[34] *See* Sarokin report; T. Jipping, "A Judge Actively Engaged in Keeping Criminals on the Street," Washington Times (Aug. 2, 1994).

[35] *See* Sarokin report at 1, 2-4; Apruzzee, "Why Judge H. Lee Sarokin is an Outstanding Nominee," Washington Times (Aug. 17, 1994).

[36] Congressional Quarterly Weekly Report (Oct. 8, 1994) at 2886.

[37] Washington Post (Oct. 12, 1994) at A22.

[38] N. Lewis, ***At the Bar***, New York Times (Dec. 9, 1994). See Legal Times (Nov. 14, 1994) at 6; Legal Times (Nov. 28, 1994) at 19; Fund-raising letter from Thomas L. Jipping (Oct. 1994).

[39] *See* Administrative Office of the U.S. Courts, ***Vacancies in the Federal Judiciary*** (Dec. 1, 1994).

[40] *See* Third Branch at 5. Specially, the Judicial Conference has recommended adding 20 temporary court of appeals judgeships, 5 temporary district court judgeships, and 18 permanent district court judgeships, plus the conversion of three temporary judgeships to permanent. (A "temporary" judgeship is filled by a lifetime Article III appointment, but refers to the fact that when an additional vacancy occurs in the district, it is not filled.)

[41] *See* CCCR 93; CCCR 91.

[42] For example, in response to the attack by then-Rep. Huffington in the California race, with respect to Judge Sarokin, former chief judge John Gibbons of the Third Circuit wrote to Huffington criticizing the attack as "seriously distort[ing]" the facts and as "unworthy of a federal legislator" who is sworn to uphold the Constitution. *See* Letter from John J. Gibbons to Rep. Michael Huffington (Oct. 7, 1994) at 1,2.

[63] Recent examples include Justice Souter (sponsored by former Senator Rudman), Judge Barkett (supported by Senator Graham and later by Senator Mack), and Judge Sarokin (supported by Senator Bradley). Many observers have also noted that the strong support of then-Senator Danforth played a crucial role in the confirmation of Justice Thomas.

Chapter VII

Interim Report on Performance of U.S. Commission on Civil Rights During the Clinton Administration

by John C. Chambers and Brian P. Waldman

What has happened to the U.S. Commission on Civil Rights? Once referred to and recognized as the "conscience of the Nation" and "America's civil rights watch dog," the Commission largely has disappeared from sight with productivity on the decline and partisan politics on the rise. This article reviews the performance of the Commission during the Clinton Administration, attempts to identify the causes of the Commission's decline, and presents recommendations for action to restore the Commission to its prior stature. Ultimately several decisions must be made: is the Commission under its present structure viable and worthwhile; and if it is not viable in its current form, should its structure be changed or should the Commission be disbanded.

I. Introduction

Congress created the U.S. Commission on Civil Rights to be an independent, bipartisan, fact finding agency of the Executive Branch under the Civil Rights Act of 1957. Congress reestablished the Commission under the Civil Rights Act of 1983. The Commission consists of eight Commissioners, each appointed to a six-year term. Under the Commission's charter, no more than four Commissioners may be affiliated with any one political party. Four of the Commissioners are appointed by the President, while the President Pro Tempore of the Senate and the Speaker of the House each appoint two Commissioners. The President appoints the Commission's Chairperson, Vice-chairperson, and Staff Director, with majority approval of the Commissioners.

Under its statutory mandate, the Commission is chartered to: (1) investigate sworn allegations that certain citizens of the U.S. are being deprived of their right to vote by reason of color, race, religion, sex, age, handicap, or national origin, or as a result of patterns or practices of fraud or discrimination; (2) study and collect information concerning legal developments constituting discrimination or a denial of equal protection; (3) appraise the laws and policies of the federal government with respect to discrimination and equal protection of the laws; and (4) submit reports to the President and to the Congress.[1] The statute requires the Commission to submit at least one report annually that monitors Federal civil rights enforcement efforts. In order to perform its duties, the Commission is empowered to hold hearings and issue subpoenas for the production of documents and the attendance of witnesses at such hearings. Although the Commission lacks enforcement powers that would enable it to apply specific remedies in individual cases, the Commission often refers complaints to appropriate federal, state, or local government agencies, as well as private organizations, for action.[2] The Commission also maintains state advisory committees in each state and the District of Columbia to monitor civil rights issues on the state level.

II. Brief History

The Commission played an active role in the 1960s and 1970s in shaping America's civil rights agenda. The Commission helped focus America's attention on remedying decades of civil injustice. Policymakers and courts relied on and cited to Commission reports and recommendations.[3]

As influential as the Commission was during the 1960s and 1970s, the Reagan Administration effectively emasculated the Commission with its appointments. During the Reagan Administration, the Commission was accused of mismanagement, spending irregularities, and inaction. Moreover, the Reagan appointees were accused of polarizing the Commission and freezing the Commission's ability to take action. Finally, concerns arose about the Commission's independence from the Executive Branch.[4]

Rather than permit the Commission to dissolve, Congress and the Bush Administration attempted to revitalize the Commission and give it an opportunity to restore its image and justify its existence. During the Bush Administration, the Commission successfully obtained two short reauthorization periods, the first in November 1989 for 22 months, and the second in November 1991 for three years. Despite obtaining reauthorization, the Commission did not receive the funding it felt necessary to achieve its goals.[5] Congress was not convinced that an increased budget was necessary or deserved. Representative Brooks summarized the second reauthorization by stating: "While authorization does not require the agency to cut programs or staff, it prevents the Commission from expanding without first fulfilling its statutory mission to investigate discrimination.... These provisions oblige the agency to allocate its resources wisely and, I trust will secure the Commission's return to its fact finding mission."[6] In a note of caution, Representative Edwards stated that if the Commission failed to perform its mandate, it should be prepared to cease operations after 1994.[7]

III. Commission During Clinton Administration

A. Commissioner Appointments

At the end of 1992, the terms of Commissioners William Barclay Allen and Esther Gonzalez-Arroyo Buckley expired. In a surprise announcement in early January 1993, President Bush filled these two vacancies, thereby preventing President Clinton from appointing two new Commissioners. President Bush appointed Constance Horner[8] and Robert George[9] to six-year terms on the Commission. President Bush's appointment of these politically conservative Commissioners has had a profound effect on the Commission. These Commissioners have contributed to a political polarization of the Commission that has affected the Commission's effectiveness.

At the end of 1992, two additional Democratic seats remained open on the Commission to be filled by Congressional leadership. The terms of Commissioners Mary Frances Berry and Blandina Ramirez expired in December 1992. In February 1993, the Speaker of the House reappointed Commissioner Berry to the Commission, and in April 1993, the Senate Majority Leader appointed Cruz Reynoso[10] to the second open Democratic seat.

The remaining four Commissioners currently serving on the Commission include Arthur Fletcher (Republican, term expires in November 1995), Charles Pei Wang (Democrat, term expires in December 1995), Carl Anderson (Republican, term expires in December 1995), and Russell Redenbaugh (Independent, term expires in December 1995).

Due to President Bush's appointments, President Clinton was unable to designate a new Commissioner himself. Despite this limitation, the President had statutory authority to appoint a new Chairperson and Vice-chairperson from among the Commissioners with their majority consent. On September 17, 1993, the President appointed Berry as Chairperson, and Reynoso as Vice-chairperson. Despite the presidential endorsement, in late October 1993 the Commission fell one vote short of approving the nominations of Berry and Reynoso, with four members abstaining, and the remaining four voting in favor of the nominations.[11] Despite the initial setback and division along party lines, on November 19, 1993, the Commission approved both nominations. The delay in approval of these appointments portended to an even greater exhibition of unproductive partisan politics.

B. Staff Director Debacle

Perhaps the greatest controversy surrounding the Commission during President Clinton's tenure, and the defining event characterizing the group's performance, has been the President's appointment of a new Staff Director. As stated above, the President has statutory authority to appoint a Staff Director with majority consent of the Commissioners. In December 1992, Commission Staff Director Wilfredo Gonzalez, a Bush appointee, resigned leaving a void at the Commission. President Clinton did not appoint a new Staff Director until September 1993. In the interim, Bobby Doctor, a social activist and long-time employee of the Commission, was named Acting Staff Director. Doctor had been the regional director of the Commission's Southern Regional Office in Atlanta from 1969 through 1986 and from 1991 through 1993.[12]

In September 1993, President Clinton announced his intention to appoint Stuart Ishimaru as Commission Staff Director. Ishimaru had an extensive background in and understanding of civil rights issues having served as assistant counsel on the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary from 1984 through 1991. Despite Ishimaru's fine credentials, in a blatant act of partisan politics, several Commissioners warned that they would not concur in the appointment. The President attempted to circumvent the statutory approval process by appointing Ishimaru "Acting" Staff Director.[13] The Justice Department justified the appointment by arguing that appointment of an Acting Director fulfilled the President's constitutional obligation to keep the government running smoothly. In response to the appointment, Commissioner Robert George filed suit in Federal district court alleging that he was denied the right to participate in the selection of the Commission's Staff Director by the President's unilateral appointment.

On April 6, 1994, Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia upheld Commissioner George's challenge and ruled that President Clinton acted illegally in failing to seek the concurrence of a majority of Commissioners in making the appointment.[14] Judge Lamberth permanently enjoined Ishimaru from exercising the authority or performing the functions of Staff Director.

The Court order left an immediate vacancy at the Staff Director's position. After this highly publicized and frustrating sojourn, President Clinton moved quickly to replace Ishimaru. On May 25, 1994, with the Commissioners' concurrence this time, President Clinton appointed Mary Matthews as Commission Staff Director. Matthews, an Independent, is a career civil servant who had been a senior Commission staffer coordinating the Commission's work during the voids created by the resignation of Wilfredo Gonzalez and the dismissal of Stuart Ishimaru.

C. Activities And Output

1. 1993-1994

Despite the highly publicized administrative woes described above that have plagued the Commission during the Clinton Administration, the Commission has issued reports and statements, held briefings and hearings, and responded to complaints of alleged violations of civil rights. In her statement before the Subcommittee on the Constitution of the Senate's Committee on the Judiciary, Chairperson Berry listed the following accomplishments during FY 1993.[15] First, in January 1993, the Commission issued a report entitled *Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects*. The report provided preliminary findings on the performance of the Departments of Transportation and Labor in enforcing various civil rights laws pertaining to hiring and contracting in the construction of the Denver International Airport. The report harshly criticized the Departments for failing to enforce minority hiring and contracting laws during the construction of the new airport. The Commission recommended that the Federal government formulate long-overdue guidelines for civil rights enforcement. The

Commission observed that the existing situation enables the federal government and municipalities to blame one another for civil right failures with neither body taking active responsibility.[16] In response to the report, Secretary of Transportation Frederico Pena informed the Commission that his Department had initiated an internal review to determine ways to improve the Department's enforcement of Title VI of the Civil Rights Act of 1964.

Later in 1993, the Commission issued *The Validity of Testing In Education And Employment.* This report evaluated the use of testing in education and employment. The report summarized the research and the views of experts on appropriate methods of test development to avoid racial, ethnic, and gender bias. Finally, in August 1993, the Commission issued a report entitled *Equal Employment Opportunity for Federal Employees*. This report examined the current procedure by which Federal agencies process employee complaints of discrimination and highlighted the conflicts of interest.

In FY 1994, the Commission completed one major report and sought to complete a second. First, in September 1994, the Commission released *The Fair Housing Amendments Act of 1988: The Enforcement Report* which evaluated a number of issues concerning housing and urban development including HUD's new system of adjudicating complaints before administrative law judges, the prosecution of complaints in fair housing enforcement, outreach, education, and the overall resources allocated for fair housing enforcement. The report concluded that "while Federal fair housing enforcement efforts have improved, enhanced enforcement of Federal laws is needed to implement fully the 1988 Fair Housing Amendments Act … [A]ppropriations 'have fallen well short' of the funds required to carry out HUD's responsibilities … ."[17]

A second report, entitled *Title VI Civil Rights Act of 1964*, will examine the civil rights enforcement efforts and activities of Federal agencies with responsibilities for insuring nondiscrimination in the federally assisted programs under Title VI. The report will review enforcement efforts in recent years and assess the adequacy of the Title VI enforcement activities by Federal agencies.

In addition to preparing reports during the past two years, the Commission issued statements on such topics as the Civil Rights Act of 1991, the fiftieth anniversary of Pearl Harbor, and religious discrimination and bigotry. The Commission held briefings as well on such topics as voter representation, statehood for the District of Columbia, and discrimination in professional and collegiate athletics.

The Commission also receives about 4,000 complaints per year from individuals alleging violations of their civil rights. The Commission refers these complaints to appropriate government and private organizations.

Finally, the Commission continues to pursue its long-term project, entitled *Racial and Ethnic Tensions in America Communities: Poverty, Inequality and Discrimination*, undertaken in 1991 to study the deteriorating condition of race and ethnic relations across America. Although the dramatic events highlighting racial and ethnic tension receive the bulk of the media and political attention, Commissioner Berry stated that the Commission believes that the "everyday tensions between neighbors and co-workers indicate a far more pervasive and destructive social condition. Underlying the headline stories are incidents of discrimination and denial of opportunity which pervade the everyday lives of this nation's racial and ethnic minorities."[18]

This long-term project is centered around a series of fact-finding hearings. According to Commissioner Berry, the Commission believes that the hearings will enable it to identify the underlying causes of the growing alienation of racial and ethnic groups. The Commission hopes to recommend ways of proactively addressing/remedying these pervasive social problems. The Commission has held hearings in Chicago (June 1992: examining police policies, processing of police misconduct complaints, and minority access to credit and business development), Los Angeles (June 1993: examining reforms in L.A. police department, government policies and programs, and media coverage and television portrayal of minorities), New York (September 1994: examining race and sex discrimination, pay disparities, employment opportunities in the finance industry, minority access to capital, and immigration), and two in Washington, D.C. (January 1992: examining the Mount Pleasant riots and its underlying causes; May 1992: examining hate incidents, multiculturalism, socioeconomic factors, the Community Reinvestment Act, and financial and banking industry practices). The Commission plans to hold future hearings in Miami (to examine immigration-related civil rights issues) and in the Mississippi Delta region (to examine the effects of state financing on public education, segregation in higher education, voting rights, and housing). The Commission intends to issue a series of reports detailing findings and recommendations stemming from each of the hearings, and ultimately issuing a summary report analyzing the common causes and major differences in the way racial and ethnic tensions are experienced and dealt with in the different communities examined.

In addition to the Commission's efforts in monitoring Federal civil rights matters, state advisory committees (SACs), composed of Commission-appointed, local volunteer officials, monitor civil rights issues on the state level. The Commission funds six regional offices that support the SACs in conducting hearings and preparing reports. During FY 1993, the SACs issued reports covering topics such as: access of the minority elderly to health care and nursing homes in New York; public education in Idaho; provisions on sex discrimination in employment in South Dakota; the need for a human relations commission in Alabama; police-community relations in southern West Virginia; stereotyping of minorities by the news media in Minnesota; environmental justice in Louisiana; and Native American students in North Dakota special education programs. In FY 1994, the SAC reports included studies of the use and abuse of police powers in minority committees in New Jersey, and of white supremacist activity in Montana. Ongoing SAC projects include: the joint study of border violence by the Arizona, California, New Mexico, and Texas committees; retention of minorities and women in public institutions of higher education in Colorado; implementation of the Americans with Disabilities Act in Delaware; and lending practices in the District of Columbia.

2. Reauthorization

The Commission's authorization expired in September 1994. The Commission seeks a six year reauthorization period with funding in excess of the $7.7 million received in FY '94. In a recent comment, Commissioner Anderson appealed to Congress to raise the level of funding to enable the Commission to expand its limited staff and better perform its chartered tasks. "Either put us out of business or give us the money to do the job," a frustrated Anderson declared.[19]

As of this writing, Congress had just passed a bill reauthorizing the Commission but the President had not signed it yet.[20] In early August, Senator Simon (D-Illinois) introduced a bill to reauthorize the Commission for three years at a budget of $9.5 million for FY 1995.[21] The bill proposed to retain the Commission's structure, but expand the groups duties to include the preparation of public service announcements and advertising campaigns to discourage discrimination and the denial of equal protection. In a stern warning Senator Simon cautioned the Commission that it "needs to do a better job of reaching out to the organizations and communities with which it has worked closely in the past."[22] Simon asked the Commission not to merely "react to the civil rights issues of the day, but [to] provide leadership on these issues . . . [in order to] once again raise the consciousness of the nation on civil rights matters."[23] Simon acknowledged that the Commission is now heading in that desired direction.

Later in August, Representative Edwards introduced similar reauthorization legislation. H.R. 4999 proposes a one year reauthorization at a funding level of $9.5 million. Like the Senate Bill, the House bill sought to expand the Commission's duties to include public service announcements. Further, in response to the Ishimaru debacle, the House bill would give the Commission's Chairperson the power to appoint an Acting Staff Director for up to one year should that post become vacant (this provision would be particularly useful in covering the lag between the resignation of a Staff Director of the end of one President's term, and appointment of a new Staff Director by the new President).

Senate and House leadership reached consensus on October 7, sending a reauthorization bill to the President. The bill recommends a two year reauthorization, and does not grant the chairperson authority to appoint an acting staff director. Further, the bill recommends a $9.5 million budget for FY 95, less than the $10.2 million sought by the President, but more than the $7.7 million appropriation in FY 94.[24]

The Congressional bill represents a triumph of hope over experience. As Representative Edwards observed, the Commission has not met Congressional expectations: "The Commission still has not fully resumed its statutory mandate. Those who have followed the Commission meetings and hearings for the past two years notice an absence of scholarly debate and a penchant for bickering over administrative rather than policy matters."[25] The Congressman emphasized the need for a "Civil Rights Commission that is committed to vigorously carrying out its statutory mandate," and believed that increased appropriations should enhance the Commission's ability to fulfill its factfinding mission and again serve a vital role.[26]

3. Commission Plans For 1995 And Beyond

With reauthorization virtually assured through September 1996, the Commission plans to refocus its efforts on evaluating Federal civil rights enforcement. According to Chairperson Berry, the Commission believes "that Federal civil rights enforcement is weak and does not adequately protect people's rights or deter discrimination."[27] To address this issue, the Commission will seek to ensure that Federal agencies carry out their responsibilities and that they have the requisite leadership and support to establish and execute tough enforcement standards. Two projects are aimed specifically at accomplishing these goals. First, a project entitled *Evaluation of Fair Employment Law Enforcement* will evaluate the Federal effort to eliminate employment discrimination by scrutinizing the policies and enforcement mechanisms of the Equal Employment Opportunity Commission and the Department of Justice. The study will focus on the implementation of the Americans with Disabilities Act, the Age Discrimination and Employment Act, and the Equal Pay Act. The Commission will examine agency resources for enforcing these and other fair employment laws, the adequacy of enforcement measures, and the conformity of charge-processing by state and local fair employment agencies with EEOC standards. A second enforcement study, tentatively titled *Evaluation of Equal Educational Opportunity Law Enforcement*, will focus on the Department of Education's efforts to enforce laws mandating equal educational opportunity. The Commission intends to examine access to equal educational opportunities for women, the disabled, and individuals for whom English is a second language.

In addition to these planned reports, the Commission hopes to expand its staff should it receive the anticipated budget increase. In particular, the Commission intends to hire staff in the General Counsel's office to help prepare for and conduct hearings, as well as draft reports.

According to Staff Director Matthews, the Commission's plans for FY 1996 include an examination of: (1) enforcement of the Americans with Disabilities Act (particularly Title II which prohibits state and local governments from discrimination); (2) the effects of changes in technology in the workplace on employment compensation and career advancement for women, minorities, and the elderly; and (3) Federal efforts to encourage citizenship and other naturalization issues. In addition, the Commission plans to continue its ongoing efforts to enhance its complaint referral function. The Commission seeks to improve complaint tracking to further identify the types of complaints, the ultimate resolution of complaints, and the speed of complaint resolution.[28] Chairperson Berry recently stated that she would like to see the

Commission pursue projects in the following areas: voting rights, environmental justice,[28] sex discrimination, and workplace and child care issues. Berry emphasized her commitment to guiding the Commission to achieve its monitoring function, making this function an integral part of the Commission's work on an ongoing basis.[29]

D. Commission's Effectiveness: Political Stalemate Stifles Progress

The Commission's performance during the Clinton Administration has been disappointing. The overall sense is that political polarization has paralyzed the Commission by limiting its ability to focus and reach consensus on substantive issues. The dearth of Commission reports is an obvious consequence. Further, the Commission frequently fails to produce timely reports. The slow turn-around time may result in reports that are out of date due to changing conditions. Moreover, the delays necessarily postpone remedial efforts in response to reports.

Even in the Commission's heyday during the 1960s and 1970s, the Commissioner's political views differed sharply. Yet in the past, political views did not inhibit the Commissioners' commitment to fulfilling their statutory mandate. The partisanism of the present Commission, however, has led many Commissioners apparently to abandon the Commission's basic mission to critically review the government and serve as a catalyst for advances in the field of civil rights. Observers discern no sense of cooperation among the Commissioners or commitment to progress. The Commission has become a pulpit for advancement of political agendas rather than an independent forum dedicated to providing critical factual analysis of complex civil rights issues.

This Commission's misdirection was manifested most clearly in the controversy surrounding the attempted appointment of Stuart Ishimaru as Staff Director. Conservative Commissioners appeared to abandon any commitment to cooperation and towards "getting the job done" in favor of partisan politics. Conservative Commissioners effectively vetoed President Clinton's appointment of Ishimaru based on their fear of losing "control" of the Commission and its staff. Ishimaru clearly was qualified for the position, yet Ishimaru and the Commission fell victim to a political agenda. This six to eight month controversy impeded the Commission's ability to act on substantive civil rights issues.[30] Valuable Commission resources were expended on this fight rather than on the pressing civil rights issues the Commission is chartered to address.

The appointment of career civil servant Mary Matthews as Staff Director appeased conservative Commissioners and has helped restore stability to the Commission (although it is presumed that a Presidential appointee will eventually fill the Staff Director post). Under the inspired and capable leadership of Chairperson Berry, the Commission offers promise of a more productive future. Representative Edwards referred to Berry as "the best thing that has happen to the Commission in recent years."[31] Berry has proven in the past to be a consensus-builder and ardent civil rights advocate. The recently released Fair Housing Amendments Act of 1988 enforcement report is the first enforcement report issued under Commissioner Berry's tenure. This report offers a critical analysis of Federal civil rights enforcement efforts and marks a return to the type of report the Commission historically produced. If the Commission receives the anticipated increased appropriation, we can only hope that it will issue more frequent and timely reports.

IV. Recommendations

A. The Commission

The Commission's success and effectiveness depend largely on its credibility. Until policymakers and the civil rights community perceive the Commission as objective and committed to a nonpartisan agenda, any reports the Commission produces will be suspect. Even in the Commission's heyday its reports were not free of criticism, but they were nonetheless recognized for their value in reporting and analyzing data.

One way to restore its credibility is for the Commission to thrust itself into topical, controversial issues and generate timely, comprehensive, objective data and recommendations. The lengthy report preparation process must be streamlined in order for the Commission's observations and recommendations to have the greatest impact. To expedite its reporting, the Commission must carefully define, and in some cases narrow, its focus before it begins a project. For example, the multiyear project on racial tension is a valuable and worthwhile endeavor, but its all-encompassing scope has resulted in little to no tangible output. If the Commission narrowed the focus of the report to study only a few aspects of racial tension rather than the multitude of factors and manifestations, the report would be completed on a timely basis and policy makers could consider the Commission's observations and recommendations. The obvious disadvantage of this approach is that the some critical issues may be analyzed. The Commission must determine how it can get enough focus on an issue to be useful. A comprehensive but outdated report is of little value.

The new $9 million budget (if President Clinton enacts the reauthorization bill) presents the Commission with a tremendous opportunity to increase its productivity and effectiveness. The Commission plans to expand its staff, particularly in the General Counsel's office.[33] A larger legal staff should enable the Commission to conduct comprehensive, yet focused, hearings. The recent hearing in New York lacked the guidance and focus necessary to maximize its usefulness. Observers noted that much time was wasted exploring the ideological views of witnesses rather than developing an adequate factual record upon which to base an intelligent and well-reasoned report. Additional and well-qualified legal staff should provide the requisite guidance.

The proposed reauthorization bill offers the Commission another opportunity. The proposed legislation seeks to expand the Commission's mandate to include public service announcements (PSAs) and advertising about discrimination. PSAs and advertisements can be tremendously effective educational tools (e.g. AIDS awareness advertisements). With the assistance of experts in the use of this medium, the Commission can reach a wide audience and raise America's awareness of civil rights issues and the manifestations of the various forms of discrimination. This medium should not be diverted into an ideological warfare between different political factions of the Commission. This is too important an opportunity to waste.

Finally, the Commission should re-examine the usefulness and value of its regional offices and the SACs. Although the members of the SACs serve on a volunteer basis, the regional offices that support the SACs receive approximately $2 million a year of the Commission's annual budget.[34] The Commission must determine whether the SACs still serve a vital function and, if so, whether the SACs can be supported at a reduced cost out of the Commission's Washington office rather than regional offices due to advances in technology. The Commission should consider whether the SACs generate enough valuable work to justify the significant diversion of limited Commission resources. The Commission must address these issues before blindly committing funds.

B. Congress

For its part, Congress may also have a profound effect on shaping and guiding the Commission. Congress can have its greatest effect in two ways: (1) by conducting a full scale review of the Commission, and (2) by addressing the appointment process.

First, Congress must review the Commission's mission and value by answering several basic questions. For example, what should be the Commission's function; have changes in civil rights issues obviated the need for the Commission or necessitated a change in the Commission's mandate;[35] and can the Commission meet its mandate without the active guidance of Congress. The Commission's performance over the past several years indicates that additional direction is needed. Congress should consider narrowing the Commission's focus by providing clearly identified objectives.

Congress must also address the appointment process keeping in mind the Commission's viability. We must ponder whether the Commission would benefit by returning to the old system of Commissioner appointments. The current system, described above, is the result of a political compromise reached after President Reagan sought to "pack" the Commission with conservative Commissioners. The prior system consisted of presidential appointment of all Commissioners subject to Senate consent. This system would enable civil rights groups to present their concerns over potential appointees. Moreover, this system would enable the President to create a body free of political distractions.

Representative Edwards observed "a direct connection between the Commission's past reputation for scholarly work and the rigors of Senate confirmation."[36] Edwards recommended that, if the Commission "fails to fully resume its factfinding mandate, . . . Congress . . . consider returning to [the system of] Senate confirmation."[37]

In the meantime, paramount to a change in the appointment process is a better understanding of the importance of an appointment. The Commission's success depends on the quality of the Commissioners. Appointments should not be made on the basis of political patronage, but should be based on an individual's reputation, experience, commitment to developing facts, fairmindedness, and ability to understand the complex and changing civil rights issues in the 1990s and beyond. Although an extensive background in civil rights issues may be helpful, the measure of a Commissioner's value to America is his/her capacity to objectively analyze facts and commitment to vigorously scrutinizing government and addressing civil rights inequities.

Finally, at the end of the next reauthorization period, Congress must objectively evaluate the Commission's performance. If the Commission does not meet its statutory mandate and continues to fall victim to partisan politics, the Commission should not be reauthorized in its present form. Congress must put all political considerations aside and, like the Commission itself must do, analyze only the facts.

Although no elected official wants to be associated with what might be perceived as an anti-civil rights agenda, Congress must vote to reorganize and redirect the Commission in 1996 if it remains largely dysfunctional.

C. The President

For his part, President Clinton also can affect the Commission's resurgence. As with Congress, President Clinton must give careful thought to his appointments. In December 1995, President Clinton will appoint two new Commissioners at the expiration of Commissioner Fletcher's and Commissioner Wang's terms. As argued above, the appointments should not be made to fulfill political debts; only well-qualified advocates should be considered.

Appointing new Commissioners, however, is not enough. The President is in a unique position to bring necessary attention to the Commission. The President can tout the Commission for its work when appropriate and remind the public of the importance of the Commission in promoting equal opportunity for all Americans. Moreover, increased attention may inspire Commissioners and staffers alike to rededicate themselves toward revitalization. President Clinton can publicize the Commission in a nonpartisan way without threatening the Commission's independence.

President Clinton professes to seek justice, opportunity, and empowerment for all Americans.[38] To achieve this end, in August President Clinton announced the formation of a Civil Rights Working Group comprised of high ranking Administration officials "to evaluate and improve the effectiveness of Federal civil rights enforcement missions and policies."[39] This is also the Commission's task. With equal vigor, the President should promote the Commission to serve as an independent body addressing similar issues.

V. Conclusions

Now as much as ever, America needs a truly bipartisan, independent Commission committed to critically monitoring Federal civil rights enforcement efforts and analyzing facts surrounding the causes and effects of discrimination. If the Commission is to continue to exist, then Congress and the President must carefully evaluate the Commission and demand its return to the forefront of the civil rights debate. Providing the Commission with necessary guidance, well-qualified Commissioners, and increased publicity are all requisite measures. If these measures are implemented, the Commission will have the opportunity to return to prominence and become a leader in the civil rights arena. If the Commission is unable to seize this opportunity, Congress must contemplate reorganization.

Endnotes

[1] Handbook of United States Commission on Civil Rights.

[2] *Id.*

[3] Anne Kornhauser, "The Silent 'Conscience'; Civil Rights Commission is Hardly in Evidence," Legal Times, July 1, 1991.

[4] Chet Lunner, "Civil Rights Commission: 'Too Important to Die'," Gannett News Service, June 12, 1991.

[5] Reauthorization of the U.S. Commission on Civil Rights: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 15, 23-24 (July 25, 1991) (testimony of Arthur Fletcher); Russell G. Redenbaugh, "Civil Rights: What the Commission Has Accomplished," Washington Post, Oct. 11, 1991, at A26.

[6] 137 Cong. Rec. H9161 (November 5, 1991).

[7] *Id.* at H9163.

[8] Commissioner Horner, a Republican, is a guest scholar at the Brookings Institution in Washington, D.C. She has served as Assistant to the President and Director of Presidential Personnel, Deputy Secretary in the Department of Health and Human Services, and Director of the U.S. Office of Personnel Management.

[9] Commissioner George, an Independent, is an associate professor of politics at Princeton University, as well as of counsel to the law firm of Robinson and McElwee in Charleston, West Virginia.

[10] Justice Reynoso, a Democrat, is a professor of law at the University of California at Los Angeles School of Law, and is Special Counsel to the law firm of Kaye, Scholer, Fierman, Hays and Handler in Los Angeles. Prior to his post at UCLA, Reynoso was an associate justice of the California Supreme Court in San Francisco, and an associate justice in the Third District Court of Appeals in Sacramento.

[11] Sonia Ross, "Civil Rights Commission Fails to Ratify Berry Nomination," Associated Press, October 28, 1993.

[12] "Bobby Doctor Named Acting Staff Director of the Civil Rights Commission," PR Newswire Association, Inc., January 28, 1993.

[13] "Restoring Rights at the Civil Rights Commission," The Washington Times, Part A, page 18, April 11, 1994.

[14] "Judge Ousts Civil Rights Staff Director, Finding Clinton Appointment was Illegal," BNA Daily Labor Report, April 8, 1994.

[15] Statement of Mary Frances Berry, Chairperson of the U.S. Commission on Civil Rights, before the Subcommittee on the Constitution, Committee of the Judiciary of the Senate, June 16, 1994.

[16] Kelly Richmond, "Civil Rights Commission Blasts Denver Airport Project", States News Service, January 11, 1993.

[17] "Commission on Civil Rights urges Beefing up of Government's Fair Housing Efforts," U.S. Commission on Civil Rights' News Release.

[18] *Supra* note 15.

[19] "House Panel Expresses Support for Reauthorized Rights Commission," BNA Daily Labor Report, Feb. 10, 1994.

[20] S. 2372, 140 Cong. Rec. D1242 (Oct. 7, 1994).

[21] 140 Cong. Rec. S11,045 (daily ed. Aug. 9, 1994).

[22] *Id.*

[23] *Id.*

[24] Despite the $9.5 million budget sought by Congress, the funds available will not reach this level. The agency appropriations legislation for 1995 signed into law on August 26 by President Clinton provides for

$9 million for the Commission if reauthorized. See Departments of Commerce, Justice, State, The Judiciary, and Related Agencies Appropriations Act of 1995, H.R. 4603, P.L. 103-317.

[25] 140 Cong. Rec. H10459, H10461 (Oct. 3, 1994).

[26] *Id.*

[27] *Supra* note 15.

[28] Telephone Interview with Mary Matthews, Staff Director of the U.S. Commission on Civil Rights (Oct. 4, 1994).

[29] According to Berry, the Commission would have to define environmental justice before determining the proper balance between economic development and the need to protect those who have historically been discriminated against from the evils that accompany such development.

[30] Telephone Interview with Mary Frances Berry, Chairperson of the U.S. Commission on Civil Rights (Oct. 13, 1994).

[31] *Id.*

[32] Telephone interview with Representative Edwards (Oct. 20, 1994).

[33] *Supra* note 30.

[34] In prior appropriation legislation, Congress required the Commission to spend at least $ 2 million annually on "regional activities." The most recent appropriation act does not earmark a specific dollar figure.

[35] For example, should the Commission's mandate include the examination of discrimination against gays and lesbians?

[36] 140 Cong. Rec. 10,459, 10,461 (Oct. 3, 1994).

[37] *Id.*

[38] "Memorandum From President Clinton to Heads of Executive Departments and Agencies on Civil Rights Working Group," U.S. NEWSWIRE, Aug. 8, 1994.

[39] *Id.*

Chapter VIII

The Equal Employment Opportunity Commission

by Alfred W. Blumrosen

I. Introduction

The Equal Employment Opportunity Commission (EEOC) was created in Title VII of the Civil Rights Act of 1964 as part of the Congressional effort to improve opportunities for minorities, women, and, later, older workers and the disabled. In 1978, EEOC was given the primary federal policy making responsibility with regard to equal employment opportunity matters.[1] In the 1980s, the Reagan Administration narrowed federal equal employment opportunity policy, gave primary policy making authority to the Department of Justice and relegated the EEOC to a subordinate role.[2] In that role, the EEOC reduced its settlement rate, lengthened the time taken to process cases, did not challenge employers' systemic discriminatory practices or support a broad conception of affirmative action.[3]

This approach continued through the Bush Administration and, as of the fall of 1994, had not been substantially changed because new leadership has not been installed at the Commission.[4] As a result of the policies instituted in the 1980s, and the absence of new leadership, the Commission has continued its drift into inconsequentiality.[5]

In the summer of 1994, the Subcommittee on Select Civil Rights and Education of the House Committee on Education and Labor held a hearing concerning the status and function of the EEOC. The hearing report is not yet available, but the testimony before the Subcommittee was critical of the agency. My evaluation of the EEOC was that :

> The Commission's operations are in shambles. It has not addressed current problems such as the massive reductions in force going on throughout industry; it is not settling cases at the rates of 15 years ago, or even at the current rates of state agencies, and it has frittered away the litigation power given it by Congress in 1972.[6]

The EEOC's reports show that it reduced the settlement rate dramatically in the 1980s, thereby denying settlements to between 25,000 and 70,000 people.[7] The EEOC "Enforcement policy" in place since 1984 assured that the agency would spend its energies on "one on one" cases rather than the systemic discrimination and class type cases which were the focus of the 1972 legislation.[8]

Since 1964, the economic, social, and legal context of equal employment opportunity problems has changed dramatically. There has been a major restructuring of the production process which eliminated thousands of semi-skilled and mid-level well-paying jobs into which women and minorities had entered under the aegis of equal employment laws. The success of these laws in improving the occupational position of millions of minorities and women, is in sharp contrast to the worsening of the conditions of millions of others, located primarily in the central cities, living in near hopelessness, and without access to the education necessary to use the newer technology.

The appointments to the federal judiciary during the twelve years of the Reagan-Bush Administrations, have not been sympathetic to equal employment opportunity laws. These federal judges have wide discretion in deciding matters of fact and in interpreting statutory programs which have become increasingly complex.[9]

Thus the EEOC, to reassume the leadership role in the federal equal employment opportunity program, needs not only an infusion of new leadership, but also new powers and policies.

II. Congressional Action Needed

A. Substantive Rulemaking Power— The Interpretation of Title VII

If the interpretation of Title VII is left to judges appointed during the Reagan-Bush Administrations, we can expect the kind of narrow interpretations given by the Supreme Court in 1988-89.[10] However, a rule of statutory interpretation and administrative law adopted a decade ago will enable Congress to address this problem.

In 1984, the Supreme Court decided what may be the most important administrative law/statutory interpretation case in our generation. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court established a new relation between the federal courts and federal administrative agencies which have substantive rulemaking powers. The older view was that administrative interpretations of statutes might be given "deference" by the courts, but were not binding on them.[11]

In *Chevron*, the Supreme Court adopted a new rule concerning the interpretation of statutes where Congress had created an administrative agency with substantive rulemaking powers. This is a two part rule: (1) if Congress has spoken to the precise issue of statutory interpretation in question, that position is binding on the agency as well as the courts; (2) but if Congress has not spoken to the precise issue in question, then the view of the agency, adopted through notice and comment rulemaking will be binding on the agency and on the courts, if that view constitutes a "reasonable" or "permissible" interpretation of the statute. Issues of whether Congress has spoken clearly, and whether an agency interpretation is "permissible" remain for the courts. Thus if Congress gave EEOC substantive rulemaking power, it could engage in "binding" statutory interpretation concerning many issues.

The EEOC has rulemaking power under the Age Discrimination in Employment Act (1967), and under the Americans with Disabilities Act (1990). But Congress in 1964 gave the EEOC little substantive rule making power.[12] As an ironic result, EEOC has less authority to interpret the original Title VII dealing with race and sex than those later enacted statutes concerning age and disability.

Congress should give EEOC substantive rulemaking powers with respect to Title VII to make its powers equal to those dealing with age and disability. Congress should direct the EEOC to make policies through notice and comment rulemaking under the Administrative Procedure Act as it has done under the Americans with Disabilities Act. Policy making through notice and comment rulemaking will clarify rights and obligations in a more comprehensive manner than is possible through litigation, and thereby facilitate the resolution of cases.[13] Policy making through rules is necessary to continue the effort to get employers to internalize EEO policies so that they will "do it right" in the first instance, rather than relying on after-the-fact litigation. It would be disastrous for the future of Title VII if the law is developed through case by case adjudication before unfriendly federal judges. [14]

This is the most important aspect of equal employment law at this time. If interpretation of equal opportunity statutes remains in the hands of unfriendly federal courts, it will not matter what other statutory powers are given the EEOC, or what changes in internal policy the EEOC adopts. The narrow interpretation of the law will dominate all such activities.

Four examples of issues which the EEOC should promptly address through rulemaking are:

1. Practices and procedures concerning reductions in force which have adverse impact.
2. Scope of affirmative action programs conducted by state and local governments
3. Practices and procedures to assure that hiring and promotion decisions based on subjective

judgments are not discriminatory. This relates to the "glass ceiling" issue.

4. Numerous issues under the Civil Rights Act of 1991 which are now in litigation.

B. Administrative Hearing Powers

The massive numbers of complaints to the EEOC, half of which involve discharge situations, the expansion of the EEOC's jurisdiction to include persons with disabilities, the conservative attitude of the federal courts, and the increasing intricacy of equal opportunity law, makes it important to provide an alternative forum to resolve equal opportunity disputes. Thus the time has come to provide the EEOC with administrative hearing powers, analogous to those of the National Labor Relations Board. These powers will give the EEOC an additional avenue to interpret and resolve uncertainties in statutory interpretation, and will enable the EEOC to develop methods of handling cases which are simpler than the rules developed by the Supreme Court, which are frequently administered through expensive and time consuming motions for summary judgment.[15]

In 1993, I suggested that:

> the process of proving a discrimination case by an individual is difficult and onerous. This process can be draining on both the employer and the plaintiff....
>
> The volume of individual cases is now so large, and the application of the federal rules is so burdensome, that a new start is needed to simplify these cases.....
>
> An administrative hearing process which would routinely begin by examining the reason for the protested personnel action could go far toward simplifying this most common and most fact specific aspect of employment discrimination law.
>
> Such a hearing could be held by the EEOC or by some separate hearing body created by Congress.... [M]ost individual discrimination cases should be removed from the complex setting of federal district court litigation and be placed in a simpler setting tailored to the problems of individual employment discrimination. This proposal could not be applied to cases where plaintiffs claim punitive or compensatory damages beyond back pay because of the right to jury trial in such cases ....

A simplified process in an administrative setting would involve the following procedures:

1. The decision to hold a hearing would be made by the agency which would screen out "frivolous" claims and would go to hearing on cases they could not settle, or complainant could choose an administrative rather than a court hearing.
2. Prior to the hearing, each party would be required to state their positions and list the witnesses they expected to call, and to provide copies of documents they expected to introduce. Employers would be required to produce all documents relating to the plaintiff and to a limited number of identified other persons whose situation is argued to be similar to that of the plaintiff and copies of records and reports concerning equal employment opportunity matters.
3. An attempt at settlement could be made by the Administrative Law Judge who would hear the case.
4. At the hearing, the employer would present its evidence first, followed by the plaintiff's effort to demonstrate that the reasons given by the employer are either not the real reasons or are not legitimate reasons.
5. If the hearing disclosed the necessity for additional evidence, the Administrative Law Judge could direct that specific material be presented. Otherwise no further discovery would be allowed.[16]

The right of an individual to sue in court should be preserved in all cases, including the right to seek punitive damages in cases of "malice or reckless indifference" under the 1991 Civil Rights Act. Complainants should have the advice of private counsel to decide whether to seek such damages in federal courts rather than pursuing an administrative hearing. The terms "malice or reckless indifference" are likely to be narrowly construed, so that many Title VII claims could be resolved through the hearing process described above. This process is essentially based on labor arbitration experience.

The administrative hearing process described above is more expeditious and more fair than the complex "ping pong game" which is still being evolved by the Supreme Court for the trial of "disparate treatment" cases under Title VII.[17] A direct trial of these cases will take place, rather than the drawn out battle of summary judgment motions which takes place today.

The standards for screening of claims which may be brought before an administrative hearing is important and complex. There must be some screening mechanism because many claims have no merit, and the burden of taking all claims to a hearing is simply not possible to bear. One standard which might be used would be whether the Commission had found "reasonable cause" to believe that the complaint was valid. If the Commission found "no cause," then it should not permit the use of an administrative hearing, and the claimant would have to seek redress in court through his or her own counsel. The problem with this approach is that the Commission has narrowly interpreted the concept of "reasonable cause" since 1984, and the Commission's investigations have not been reliable indicators of discrimination. A better investigation process, and a definition of reasonable cause which was in effect between 1977 and 1981 would make this approach workable.[18] Alternatively, the issue could be left to the General Counsel, as it is at the NLRB.

The case for the complainant before the Administrative Law Judge could be presented by an EEOC attorney, by EEOC-retained counsel or by private counsel. Given the limited resources of EEOC, private counsel would be necessary in many cases, and attorney fees payable in the federal courts should also be payable in cases brought before the Commission. The administrative law judges could either be full time or part time adjudicators.

The Commissioners would sit in appellate review of decisions of administrative law judges to assure that Title VII standards were complied with by the ALJ, and that the judgment was supported by evidence. The decisions of the Commission on questions of law should, as indicated above, be recognized by the courts if they constitute a permissible construction of the law on a matter which Congress had not expressly resolved.

III. Changes in Commission Practices Needed

A. Changes in Settlement Practices

Commission policies concerning individual cases reduced the settlement rate to 15-17% of complaints received during the late 1980's. These policies, ranged from the decision as to when to accept a complaint to a redefinition of "reasonable cause" to mean the likelihood that complainant would prevail in court. They should be reexamined in detail to identify unnecessary or unreasonable barriers to a fair evaluation of complaints. Congress intended the conciliation process to be the primary vehicle by which Title VII was to be enforced, and settlement efforts should be encouraged to achieve that end. Thus some version of the Rapid Charge Processing System instituted under Chair Eleanor Holmes Norton should be reestablished by the Commission. That process combined investigation with settlement efforts. It did increase settlement rates and reduced the time for processing of cases.[19]

One of the concerns expressed about the Rapid Charge Processing system was that employers would buy off the strong cases which might have led to major litigation. This risk is more significant as a result of the 1991 Civil Rights Act. Under that Act, individual complainants are entitled to punitive damages if the discrimination against them was done "with malice or reckless indifference." Rights of complainants who were discriminated against in that way should not be casually settled. When there is evidence of "malice or reckless indifference" the complainant should be advised by EEOC to consult private counsel before settling a case. This requirement should prevent the casual settlement of such cases.

B. Developing an Intelligent Litigation Program

The present litigation policy of the Commission has produced absurd results. The Commission litigated only 4.4% of all Title VII cases brought in federal courts between 1974 and 1992.[20] Of the cases that it did litigate, fewer than 20% involve class wide or systemic issues. The rest were "one on one" individual discrimination cases. This allocation of litigation resources is contrary to the purpose for which the litigation power was given the Commission in 1972. That purpose was to address problems which were technically complex and involved systemic discrimination.[21] The private bar is fully competent to represent individuals in these "one on one" cases. The Commission should provide complainants with a list of practitioners who are qualified to conduct "one-on-one" litigation. The prospect that the EEOC will recommend litigation by private counsel may actually provide a greater inducement to respondents to settle such cases, than the remote prospect that the EEOC might itself undertake such litigation.

The EEOC should concentrate on major cases that will address systemic discrimination, and may require technical expertise, expert witnesses and the like which the private bar would find it difficult to litigate or finance. There may also be cases which would establish precedents on matters outside of the rulemaking authority discussed in part II above, in which the EEOC should participate.

In addition, the EEOC should provide litigation support for major cases which are undertaken by private counsel, but which require major expenditures or expertise; and conduct "institutional" litigation, protecting claimants against retaliation, enforcing subpoenas and record keeping/reporting requirements.

C. Developing "Before the Fact" Procedures

The Commission has not utilized its guideline issuing authority in a significant way since the Reagan Administration came to power in 1981. There are many issues on which guidelines should be developed, such as the appropriate methodology for conducting reductions in force which may have adverse impact on protected classes and the right of states to take affirmative action under Title VII. It is an unreasonable burden on employers and protected group members to leave such issues to piecemeal litigation. Of course, it would be preferable if the EEOC were given the power, discussed above, to adopt substantive rules. But even without such power, the EEOC should address current problems through guidelines, rather than leave them unstructured.

For some of these problems, the EEOC should develop an "advice" or "advisory opinion" practice, which could examine the legality of proposed programs, such as reductions in force, or affirmative action, which would be likely to have disparate impact. EEOC guidelines could provide some protection for employers who follow them.[22] Of course, such advice must be cautiously given, and could not insulate employers from liability for abuses of systems which had been approved. The EEOC has always avoided giving such advisory opinions, but the magnitude of current problems, such as the reduction in force phenomena, call for a more active role by the Commission.

IV. The EEOC Should Address Broader Issures Which Affect Employment Opportunities

The assumption behind Title VII was that restrictions on minority/female/older worker/disabled worker employment opportunity were within the control of the employer. Therefore, laws regulating the way that control was exercised would improve opportunities for minorities, women and other protected groups. But some employers have lost a part of their freedom of choice. If schools in the central cities do not educate in basic skills, or if wage rates in less developed countries are 10% those in the U.S., employer freedom of choice of workers is circumscribed and Title VII can do little about it.[23]

The global economy means that forces beyond employer choice will impact on employment opportunities protected by Title VII.[24] The EEOC, as part of its authority to report to Congress, should identify and discuss these issues, and make recommendations to Congress concerning them.

By way of illustration, these issues should include:

- Do workers in low wage countries have the right to organize and be represented by unions of their choice? If not, should employers who use their low wage labor have access to our markets?
- If schools in the central cities are so bad, should parents be encouraged to "leapfrog" out of those cities, to exurbia where schools are better, crime is less, and job opportunities may be better for lesser skilled people than in the central cities?

V. EEOC Should Develop a Broad Statistical Picture of EEO Progress and Problems

The Commission should draw together government statistics which concern equal employment opportunity. Right now, to get a picture of how the country is doing with regard to minority, female, older worker and disabled employment, there are figures from the EEOC, the OFCCP, Bureau of Labor Statistics, Bureau of the Census, Office of the Administrator of Federal Courts, court administrators around the nation, and probably others. The OFCCP and the EEOC have statistics showing how larger companies are doing on EEO over different years, but only *The New York Times* seems able to put together a picture of what is happening.[25]

These figures should present a balanced picture. While opportunity is not equal in the U.S., minorities and women have far greater opportunity than their parents had thirty years ago when the Civil Rights Act was adopted. It is important that this fact be recognized, even as we understand that much discrimination remains to be addressed. The improvement in opportunity which has taken place over the last 30 years gives hope that, with greater dedication and competence, the next era will bring us closer to a society in which opportunity is truly equal. It is modest to point out that 5 and one half million minority employees are in higher level jobs than they would have been under the occupational distribution of 1960, and that 6 million women have moved into executive, managerial, professional and sales jobs since 1972.[26] Knowing this gives hope that the continued struggle for equality will succeed, and that the promise of the Civil Rights Act of 1964 will be redeemed.

Endnotes

[1] This responsibility was transferred from the Equal Employment Opportunity Coordinating Council, created under the 1972 amendments to Title VII, which was intended to smooth out differences among several federal agencies with overlapping responsibilities in the EEO area.

[2] *See* Alfred W. Blumrosen, Modern Law: The Law Transmission System And Equal Employment Opportunity, hereafter cited as Modern Law, 390, n12 (1993).

[3] *See* Reginald C. Govan And William L. Taylor, eds, One Nation, Indivisible; The Civil Rights Challenge For The 1990's, hereafter cited as One Nation, pp. 180-216 (papers by Burton Fretz and Donna Shue and by Claudia Withers and Judith A. Winston.)

[4] A new Chair and two Commissioners were confirmed by the Senate in October 2, 1994, nearly two years after President Clinton was elected.

[5] This drift was dramatically illustrated during the hearing before the subcommittee on Select Education and Civil Rights of the House Committee on Education and Labor, July 26, 1994.

[6] Testimony of the author before the Subcommittee on Select Education and Civil Rights of the House Committee on Education and Labor, July 26. 1994, p. 4-5.

[7] EEOC Settlement Rates, 1985-1990, Compared To EEOC Settlement Rate In 1981 And State Agency Rates, 1985-1990

	EEOC Settlement Rates			**State FEPA**	**Increase in Settlements If EEOC Settled**	
Years	**Charges**	**# settled**	**%**	**settled %**	**At State %**	**At 1981%**
85-86	102,613	14,219	13.8	26	+12,460	+26,826
87-88	90,480	12,820	14.7	22	+6,698	+23,372
89-90	93,349	15,938	17.	24	+6,465	+21,401
					+25,614	**+71,599**

(Data from 1985-88 from Modern Law, p. 273, data for 89-90 from EEOC Annual Reports).

[8] On Congressional policy behind the 1972 grant of litigation authority to the EEOC, *see* Modern Law, note 2 supra, 147-150.

Number and percent of substantive EEOC cases which raised "class" issues during 1990-1992 compared to total employment discrimination cases filed in federal court

Year	**Total Filed by EEOC #**	**"Class/Systemic' by EEOC #**	**%**	**All Federal Ct. Employment Cases**
1990	359	67	18.6	8,413
1991	452	89	19.7	9,115
1992	347	47	13.5	9,672

[9] For a discussion of some of the problems of interpretation under the Civil Rights Act of 1991, *see* Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991,* 45 Rutgers L. Rev. 903-919 (1993); Reginald C. Govan, *Honorable Compromises and the Content of the Civil Rights Act of 1991,* 46 Rutgers L. Rev. 1 (1993); Peter M. Libold, Stephen A. Sola and Reginald E. Jones, *The Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas and Disparate Impact,* 45 Rutgers L. Rev. 1043 (1993);

Cornelius J. Peck, *Power and Policies: The Civil Rights Act of 1991,* 2 Widener J. Pub. L. 1 (1992).

[10] The Supreme Court may attempt to continue the process of narrow interpretation. See the strange case of St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) in which the Supreme Court, as well as the Court of Appeals, became so engrossed in the intricacies of the proof process in employment discrimination cases—which they proceeded to unnecessarily complicate—that they did not overturn the clearly erroneous view of the District Court that an employer was not responsible for a "personal vendetta" carried out by a supervisor against a black worker. Employing a supervisor who carries out "personal vendettas" against blacks would seem to be the most brutally obvious form of discrimination.

[11] This view was applied to EEOC guidelines in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and other cases. *See* Alfred W. Blumrosen, *The Binding Effect of Affirmative Action Guidelines,* 1 Labor Lawyer 261 (1985).

[12] The original Title VII, Sec. 713 (a) provides that the agency may make procedural rules. This has been interpreted by negative implication to preclude substantive rulemaking, except with respect to grants of immunity under Sec. 713 (b), Alfred W. Blumrosen, *The Binding Effect of Affirmative Action Guidelines,* 1 Labor Lawyer 261 (1985).

[13] *See* MODERN LAW, note 2 supra at pp. 242-245, 258-262)

[14] This situation led Congress in 1935 to set up the National Labor Relations Board to implement the newly recognized rights of workers to organize and bargain collectively. MODERN LAW, 37-38

[15] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

[16] MODERN LAW, note 2, supra, pp.172-174

[17] See note 10, supra.

[18] For the varying definitions of "reasonable cause" adopted by the Commission, *see* MODERN LAW.

[19] MODERN LAW, *supra* note 2, pp.163-165, 271.

[20] *See* Appendix II to testimony of author before the Subcommittee on Select Education and Civil Rights of the House Committee on Education and Labor, July 26, 1994.

[21] MODERN LAW, note 2 supra, 147-149.

[22] *See* note 12 supra.

[23] *See* Alfred W. Blumrosen, *Society in Transition I: A Broader Congressional Agenda for Equal Employment—The Peace Dividend*, Leap Frogging and Other Matters, 8 Yale Law and Policy Review 257 (1990).

[24] *See* in general, Robert Reich, THE WORK OF NATIONS (1991).

[25] *THE NEW YORK TIMES*, Sept. 14, 1993, p. 1.

[26] INCREASE IN NUMBER OF BLACK AND HISPANIC WORKERS EMPLOYED IN 1992 OVER THAT NUMBER WHICH WOULD HAVE EXISTED UNDER THE OCCUPATIONAL DISTRIBUTION IN 1960

Executives and Managers:	845,000
Professional and Technical	875,000
Sales	1,015,000
Administrative Support	1,655,000
Precision Production, Craft	1,100,000
Operators, fabricators	890,000
Laborers	-520,000
Service	-435,000

Affirmative action apparently continued through the Reagan-Bush period of intense opposition to affirmative action and broad interpretation of the statute. The net increase in jobs between 1983 and 1992 was 16,764,000. The net increase in jobs held by black and hispanic workers during that period was 5,976,000. This amounts to 35% of the net increase in jobs during that period. At the same time, minority unemployment rates remain double those of whites, and the social disaster of the cities enfolds a far higher proportion of minorities than of whites. Title VII has little relevance to those who do not have the basic qualifications for employment.

[The methodology used to arrive at these figures is described in MODERN LAW, note 2, supra at 290-294. Numbers have been rounded down. The problems in using this method are described in the note on p.292. The question of attribution of these results to the Civil Rights Laws is discussed at p. 306-15. The methodology described in MODERN LAW was applied to employment figures for the year 1992, as set forth in Bureau of the Census, Statistical Abstract of the United States, 1993, Table No. 644, pp. 405-407.]

PERCENTAGE OF JOBS HELD BY WOMEN, AND INCREASE IN NUMBERS OF WOMEN IN HIGHER LEVEL JOBS, 1972—1992

	% 1972	**%1992**	**increase #**
Executives and Managers	19.7	41.5	3,218,000
Professional	44	52.6	1,409,000
Technical	38.4	49	450,000
Sales	40.5	47.9	1,029,000
Administrative Support	75	79.3	801,000
Precision Production, Craft	4.76	8.6	504,000
Operators, fabricators, Laborers	24	25	170,000
Service	55.5	60	685,000

The enhanced role of women in the workforce is captured in Census Bureau data which permits comparison of the percentage of jobs in different job categories held by women in 1972 and in 1992. That was the first year in which the issue of gender discrimination was finally taken seriously by the nation.
[Statistics for 1972 from MODERN LAW, note 2, supra, Table 18.6 at p. 298. Statistics for 1992 from Bureau of the Census, Statistical Abstract of the United States, 1993, pp.405-07.]

Chapter IX

The Clinton Administration and Civil Rights Enforcement in Elementary and Secondary Education

by Patricia A. Brannan[1]

The election of Bill Clinton in 1992 was generally heralded as an opportunity for civil rights enforcement to recapture a priority on the national agenda. Backed by powerful votes of confidence from minority communities, although trying to distinguish himself from the classical liberal Democrat mold, President Clinton has demonstrated by his appointments some willingness to light a fire under the federal apparatus for civil rights enforcement that went largely unused during the Reagan and Bush Administrations.

The commitment that Deval Patrick, the head of the Justice Department's Civil Rights Division, expressed at his swearing in, that restoration of civil rights is part of a "great moral imperative,"[2] dispelled some of the pessimism of the civil rights community over the aborted nomination of Lani Guinier. Presidents Clinton's abandonment of Guinier, a proponent of somewhat novel notions of the results that can be achieved under the Voting Rights Act, caused concern that the fear of congressional resistance to a controversial nominee would result in a weak civil rights advocate. That fear seems not to be realized in Patrick. Similarly, Secretary of Education Richard Riley, while not particularly identified with zeal on civil rights issues, proved himself during commemorations of the fortieth anniversary of the decision in *Brown v. Board of Education*[3] to be an eloquent spokesman for the historical and present significance of that decision. In particular, Riley stressed the positive social and educational results that have been achieved through desegregation, which was a theme not often sounded during the commemorations of the *Brown* anniversary.

As described below, if the Administration's record to date in civil rights enforcement in elementary and secondary education is any guide, the spirit and intentions of the Clinton era are markedly different from those of the last two Administrations. This Administration has yet to face many of the tests of seeing through its intentions. It is only in the follow-through that real progress can be measured.

A. Department of Justice Litigation Positions in Cases Affecting Education

One of the challenges that faces a new administration with a significantly different civil rights enforcement agenda than its predecessor is determining whether and how to change positions in ongoing litigation. The Clinton Civil Rights Division has taken a bold stance in one case affecting elementary and secondary education, that signals a strong willingness to change course.[4]

In a case with significant ramifications for voluntary affirmative action plans, *United States v. Board of Education of the Township of Piscataway*,[5] a district court in New Jersey held that a school district's voluntary affirmative action effort violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by discriminating against Sharon Taxman, a white school teacher, on the basis of race. The Justice Department originally brought suit against the Board of Education for the Township of Piscataway (the "Board") and Taxman intervened.

After the district court's decision, the Justice

Department reevaluated its position and sought leave to file a brief defending the Board's affirmative action policy.

The Board developed an affirmative action plan in 1975 pursuant to a State of New Jersey Board of Education regulation requiring each district to adopt two resolutions regarding equal opportunity in education.[6] One of the resolutions provided guidelines for equal educational practices and the other required an equal employment policy. The Board's affirmative action plan provided the following guidelines for employment decisions: "[i]n all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended."[7] In 1983, the Board amended its affirmative action policy to include all aspects of employment and layoffs.[8] In 1985, the Board added as an addendum to the affirmative action policy statistics on the racial demographics of the school district's workforce. These statistics showed that the number of blacks within the Educational Professional category in the district was higher than the number of blacks available in the county workforce.[9] Therefore, the Board based its affirmative action policy on the need to ensure faculty diversity rather than remedying past discrimination.[10]

In 1989, the Superintendent recommended that the Board reduce the number of teaching staff in the Business Education Department. Taxman, the white teacher and Williams, a black teacher, were tied in seniority. In order to maintain faculty diversity within the Business Education Department, the Board decided to use the 1983 affirmative action policy to break the tie, thereby retaining Williams and terminating Taxman.[11]

In granting the motion of Taxman and the United States for summary judgment, the district court held that the only lawful objective of a voluntary affirmative action plan under Title VII is remedying past discrimination.[12] The district court went further and held that even if there had been a lawful objective, the plan would still fail because it unnecessarily trammeled Taxman's rights.[13] The district court awarded Taxman, among other things, back pay in the amount of $123,240.57 and $10,000 for emotional pain, suffering, and humiliation.

On appeal to the Third Circuit, the Justice Department filed a brief in support of the Board's affirmative action plan. The Justice Department argues that the district court's ruling was too narrow an interpretation of Supreme Court affirmative action precedents. The Department maintains that *United Steelworkers v. Weber*,[14] and *Johnson v. Transportation Authority*[15] do not limit the possible lawful justifications for voluntary affirmative action plans under Title VII. Citing *Johnson's* reliance on Justice Powell's opinion in *Bakke,* the government goes on to argue that there is "strong support for diversity as a justification for employing race-conscious criteria," particularly in the context of education. The government also takes issue with the district court's interpretation of *Wygant* because in *Wygant* the rationale for race-conscious layoffs was to remedy societal discrimination by providing role models, not to promote faculty diversity for educational reasons. The Justice Department's brief notes that integrated faculties have long been a requirement in desegregation cases.

The government's brief also challenges the district court's holding that the Board's affirmative action plan unnecessarily trammeled Taxman's rights because it resulted in her termination and was not temporary in nature. The government argues that the Board's plan is almost identical to the plan upheld in *Johnson* because both use race as "plus factors," as approved by *Bakke.* The Justice Department maintains that because the "majority of Justices in *Wygant* acknowledge that race-conscious measures may be appropriate in the context of layoffs," the district court's ruling that the inclusion of layoffs in the Board's affirmative action plan unnecessarily trammeled the rights of the white teacher is flawed. The government further argues the "Board's actions may properly be deemed temporary because they had only a temporary effect on Taxman's employment with the Board," because she has been rehired. These facts, in addition to the alternatives considered by the Board to break the seniority tie, do not result in the trammeling of Taxman's rights, according to the Justice Department. The government urges the Third Circuit to reverse the district court's decision because, if it stands, it will operate as a disincentive for employers to develop plans to ensure diversity in the workforce and would undermine the objectives of Title VII.

The about-face in the *Piscataway* case is becoming a lightning rod on the positions of the Department of Justice in civil rights cases. Sen. Orrin G. Hatch, the likely next Chairman of the Senate Judiciary Committee at this writing, has cited the change of position in *Piscataway* as an example of vigorous civil rights enforcement that he would like changed.[16]

B. The Legality of Scholarships Targeted to African Americans or Other Minority Groups.

The issue of the legality of minority-targeted scholarships affects higher education much more prominently than elementary secondary education, particularly more than public elementary and secondary education. The subject of minority scholarships has been treated by Reginald Wilson in his paper in this report titled "Minority Access to Higher Education." This Administration's shift on this issue is noteworthy here, however, as part of the pattern of change. The position of the Bush Administration's Department of Education that of scholarships restricted by race, including those targeted to minorities to promote campus diversity, were likely illegal was a powerful symbol of the effort to restructure the civil rights debate. That Administration assumed that the playing field was level unless specific acts of discrimination against individuals were shown. The Clinton Administration has showed renewed interest in the broader issue of rectifying historic wrongs with social policy sensitive to advancing groups who have been disadvantaged historically.

C. New OCR Guidelines for Government Review of Racial Incidents, Racial Harassment, and Hostile Racial Environment at Education Institutions

On March 10, 1994, the Department of Education Office for Civil Rights (OCR) issued a Notice of Investigative Guidance for Racial Incidents and Harassment.[17] The Guidance states enforcement policy under Title VI of the Civil Rights Act of 1964 and does not have the force of law. It describes how OCR offices will analyze and investigate complaints of racial incidents involving, and racial harassment against, students at federally funded education institutions, including public elementary and secondary schools. The Guidance raises potential responsibility of public school officials for racist activity by students (i.e., harassment based on race, color, or national origin) and articulates a "hostile environment" basis for a Title VI charge.

Under the Guidance, OCR will apply a "standard different [i.e., disparate] treatment analysis" to allegations of racial incidents or harassment by representatives of an education institution. The first inquiry will be whether an agent or employee, acting within the scope of official capacity, treated a student differently on the basis of race, color, or national origin, in the context of an educational program or activity. If the agent or employee did so, OCR will examine whether he or she had a legitimate, nondiscriminatory reason, and whether the differential treatment resulted in interference with the student's ability to participate in or benefit from services, activities, or privileges provided by the school. If OCR finds that there was both differential treatment and interference with a student's education, OCR may find that a school system violated Title VI, even if there was a legitimate, nondiscriminatory, nonpretextual basis for the differential treatment.

In addition to institutional liability for acts of agents or employees, under the Guidance OCR can find a school system liable for discriminatory acts of others, notably students. The Guidance asserts Title VI liability for creation by a student or students of a racially hostile environment. According to the Guidance, a public school system has violated Title VI under the hostile environment theory if it has "effectively caused, encouraged, accepted, tolerated, or failed to correct a racially hostile environment and it has actual or constructive notice of racially harassing behavior."[18] An alleged harasser need not be an agent or employee for a school system to be liable under hostile environment analysis. OCR will consider the nature and scope of the evidence to determine whether public school officials are responsible for creation of the hostile environment, specifically: (1) whether the harassing conduct is sufficiently severe, pervasive, or persistent to interfere with an individual's ability to participate in or benefit from services, activities, or privileges provided by the public school; (2) whether the school system had actual or constructive notice of the hostile environment; and (3) whether the institution responded adequately to address the harm.

The severity of the racial harassment will be judged in the context of the educational setting and in light of the characteristics of the complainant. The standard is whether the harassment would have adversely affected a reasonable person of the same age and race. The nature and location of the incidents and the size of the institution will be taken into account. Thus, fewer or less severe incidents may be deemed to create a hostile environment in a small institution, such as a public elementary school. An incident on school grounds may have different consequences than one that occurred off campus.

When considering whether a hostile environment exists at a public school, OCR will investigate racial incidents that have occurred there, whether or not they are identified in the complaint to OCR. Moreover, the racial acts a complaint identifies need not have been targeted at the complainant. Similarly, the racial conduct complained of need not be based on the victim's or complainant's race, provided that the conduct was racially motivated. Finally, in order to justify OCR sanctions, victims of harassment need not demonstrate that they have suffered "tangible injury or detriment" as a result of racial incidents.

To be liable for a racially hostile environment under the Guidance, an education institution must have actual or constructive notice of the racial conduct. A school system can receive actual notice in various ways, such as: the filing of a grievance; a complaint to a faculty member, administrator, or campus security officer; or the witnessing of harassment by an agent or employee of the institution. The school system also may receive indirect notice, as from the media or a community member.

If the school system was not on actual notice, constructive notice will suffice. Constructive notice occurs when "upon reasonable diligent inquiry in the exercise of reasonable care" the system should have known about a student's discriminatory conduct. If school officials should have known to make an inquiry, and could have discovered the conduct had they made a proper inquiry, they may be found liable for creating a hostile environment. A school system may be charged with constructive notice even if it had only partial knowledge. Thus, under the Guidance, public schools that have reason to believe that untoward activities occurred must make a reasonable inquiry to determine the nature and extent of the incident or incidents that were the subject of a complaint.

In addition, constructive notice will be imputed to a public school system if the harassment was sufficiently pervasive, persistent or severe to constitute notice, or the alleged harasser is an agent or employee of the system, or the institution has inadequate anti-discrimination policies and practices, or lacks an accessible procedure by which victims can make complaints known. The harassment need not have been overtly racial; if the school system should have known the harassment was racial, it will be deemed to be on notice of the racial nature of the conduct.

OCR also will evaluate a public school system's response to racial conduct. Action taken by the system will be judged for reasonableness, timeliness, and effectiveness. OCR will evaluate the system's policies and procedures as well as its adherence to them.

The OCR Guidance "leverages" OCR's impact on racial harassment issue by giving school systems substantial incentives to organize a system whereby information or complaints about such activity are brought to the attention of and acted on by school officials. It remains to be seen whether the Guidance is effective in enforcement practice, in particular how it squares with the First Amendment concerns that complicate the regulation of this area. A footnote to the Guidance asserts that it is directed at conduct that constitutes race discrimination under Title VI and not the content of speech. It ends with the following ambiguous directive, however:

> In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters.

D. The Scope of the Challenge on School Desegregation

The major elementary and secondary education issue affected by federal civil rights enforcement action still is school desegregation. The Department of Justice has hundreds of open school desegregation cases on its docket in which the United States, as a plaintiff or plaintiff-intervenor, will have some role in determining when and whether each case will end. Many of these cases have been largely inactive, and without strategic direction by the Department for more than 12 years. The Department must face the issue of whether they need to be reactivated, broadened, or redirected to some goal.

The OCR similarly has dozens of open cases in which it faces such issues. To compound the problem, at the start of the Clinton Administration, complaints at OCR were severely backlogged, with dozens of complaints pending for more than one year. The first task for Administration officials has simply been to figure out what is pending, and to put out the fires in the most urgent cases.

With President Clinton's 1992 term half over, and faced with deep uncertainty over whether a Democratic electoral victory in 1996 is possible, civil rights officials with school desegregation case responsibility face a limited window within which to carry out priority tasks. One issue the United States Supreme Court and other federal courts throughout the country has urged on them is when federal court jurisdiction in pending court cases should be ended. In two recent terms, the Supreme Court has addressed issues relating to the achievement of "unitary status" in these cases. In 1991, in *Board of Education of Oklahoma City v. Dowell*,[19] the Court held that a declaration by a federal court that a school district is unitary, after a motion, hearing, and specific findings by the court, ends federal court jurisdiction. Changes to a desegregation plan, by, for example, returning students to neighborhood schools who had been transported to desegregated settings, are not actionable unless plaintiffs can show a fresh constitutional violation, with the challenging obligation of showing intent on the part of the school district. In *Freeman v. Pitts*,[20] the Supreme Court held in the following term that a school district may be declared partially unitary, that is, unitary in some aspect of its operations while the court retains jurisdiction in other areas. The opinions in both *Dowell* and *Freeman* were cloaked in extensive discussion of the importance of returning school districts to local control.[21]

These cases are a strong signal of the need for the Department of Justice to organize a set of criteria, even if only on an internal basis, to use as school districts seeking unitary status approach it.[22] While the facts of every case are different, and the scope and type of school desegregation remedies throughout America vary widely, it will be important for the Department to resolve on a principled basis the many requests it will continue to get for a consent decree or favorable response to a motion for unitary status. Its efforts to require additional remedial action, or additional time for current remedial action to work, in some cases will be enhanced if it has shown that it is willing to let go of cases where there is no substantial additional effort that can be expected to further remove the vestiges of segregation, and the defendants have acted in sufficient good faith to entrust them with the operation of the district in the future.

The Justice Department and Department of Education also face the difficult task of determining whether and where to bring new litigation, or to undertake new initiatives in existing school desegregation litigation. This is complicated by the fact the tide is running in the opposite direction. As more and more courts express their weariness with current school litigation, and increasing numbers of districts seek unitary status, the Department of Justice will be in much stronger position to pursue initiatives if it brings them before the point of a unitary status motion. After over a decade asleep at the switch, the equities in favor of the United States are not very positive if it seeks new initiatives in a case only when the school district approaches the court to demonstrate that it has satisfied the court's requirements and removed the vestiges of segregation to the extent practicable. The Department should act quickly to identify a key group of cases in which it will assess the effectiveness of relief and the trend of desegregation activity in the defendant district and determine whether new initiatives are needed. Identifying such a group of cases will require considerable discretion. One approach would be for the Department to analyze where the United States has had considerable complaints in the area of housing discrimination, or where open issues in the area of voting rights are pending. If a school district requiring preclearance under the Voting Rights Act has not had a plan precleared since the 1990 census, for example, that district's school case should be examined carefully.

In addition, the United States Supreme Court will consider a case this term that has powerful implications for unitary status policy. While the United States is not a party to *Missouri v. Jenkins*,[23] it raises an issue of considerable importance: whether the success of the programs designed to remedy the educational vestiges of segregation will be measured by student outcomes, or by the level of resources put into the remedy. The State of Missouri argues in *Jenkins*, the Kansas City school desegregation case, that the *Milliken II*[24] programs there should be declared unitary because the State has contributed resources that have brought the programs up to the level of the surrounding suburbs. The State asks the Supreme Court to reject the proposition that student outcomes, such as those measured by standardized tests, can be a relevant consideration in deciding whether *Milliken II* programs have been successful. The State's brief on the merits features a sweeping attack on the proposition that there are educational vestiges of segregation that still can be articulated and remedied at this distance from *Brown*. *Jenkins* is the only school desegregation case on the Court's docket so far this term. Oral argument is expected in January of 1995. Since the Department of Education does seek outcome data in school desegregation situations,[25] and it has become almost axiomatic among educators that the success of educational programs should be measured by results, *Jenkins* appears to have significance for how the United States will assess whether a school district is unitary, regardless of whether the United States chooses to participate in the case in the Supreme Court.

E. Summary of Various Civil Rights Actions Affecting Elementary and Secondary Education by OCR and the Justice Department

The following is a summary of various enforcement actions and litigation positions taken by OCR and the Justice Department since January 1, 1993:

- *Sexual Harassment in Elementary School*: In April 1993, OCR found that a Minnesota elementary school violated a first-grade girl's rights under Title IX by failing to prevent young boys from sexually harassing her in school. This is a powerful indicator that school districts will be looked to as responsible for student-on-student sexual harassment.
- *Discriminatory Student Grouping:* In a July 7, 1993 letter to the superintendent of schools in Richmond, Virginia, OCR found that the school district had violated Title VI by grouping white students together in predominantly white classes

at two majority-black elementary schools.

- *Protecting the Rights of Lintel English Proficient Students*:
  1) In November 1993, citing a "17-year record of failure" at serving Limited English Proficiency students, OCR threatened to withhold federal funding from the Oakland (State) Unified School District if it did not improve educational services for LEP students. OCR's letter followed an investigation into whether the district's LEP programs complied with Title VI.
  2) In March 1994, OCR initiated an investigation into whether an Oklahoma school district and two Texas school districts were educating LEP students in accordance with Title VI and other federal laws. OCR selected the three districts for review after an annual survey showed discrepancies between the numbers of LEP students attending schools within those districts and the number of students actually being served in LEP programs.
- *Disabled Students' Rights to Educational Services:*
  1) The Department of Education, Office of Special Education Programs, stated in a September 1993 policy letter that disabled students expelled from school for carrying guns nevertheless are entitled to receive educational services at an alternative site under the IDEA.
  2) After an intensive review of the Chicago Public School District's special education programs, OCR entered into agreements in 1994 with the district to compel future compliance with the IDEA, including a promise by the district to educate special education students in the least restrictive environment.
  3) In August 1994, OCR ordered the Maryland State Department of Education to develop a plan to bring the 12 privately managed Baltimore City Public Schools into compliance with federal special education laws. The schools at issue in the Baltimore public school system are managed and operated under contract by Education Alternatives Inc., a Minneapolis-based private education management company.
- *OCR Review of Graduation Exams:* In March 1994, OCR undertook an investigation into whether the Ohio high school proficiency examination, passage of which is a prerequisite to graduation from high school in Ohio, discriminates against minority students. OCR has focused its investigation into whether the proficiency examination is valid for the purposes for which it is used and whether schools adequately prepared minority students to take the exam. This investigation raises interesting issues, still unresolved, about reconciling the movement toward state standards with fairness toward all students.
- *Enforcing the ADA*:
  1) In a similar agreement, Justice settled a claim of possible bias against disabled persons in the administration of the Scholastic Aptitude Test (SAT). Under the agreement, the Educational Testing Service, which administers the SAT, will offer the test to disabled students twice a year, as opposed to its prior practice of offering the test to disabled persons only once a year. This is similar to an agreement reached in May 1994 with BAR/BRI, the nation's largest provider of bar review courses, requiring BAR/BRI to provide sign language interpreters and Braille copies of its written materials.
  2) In a September 1994 policy letter, OCR stated that the ADA may require school districts to provide special services and accommodations to students with temporary disabilities, such as broken bones, where the temporary disability significantly impairs a major life activity.
- *Dismissal of Principal Accused of Making Racist Comments*: On May 17, 1994, the Justice Department filed a lawsuit alleging that the Randolph County School District in Alabama violated minority students' rights by not responding appropriately to allegedly racist comments made by a high school principal. Justice also accused the district of engaging in discriminatory hiring and disciplinary practices. The school district gained national notoriety when one of the high school principals was accused by

students of threatening to cancel the school prom if any interracial couples planned to attend.

- *Bible Club's Right to Hold Meeting in School*: In a May 1994 brief filed with the U.S. Court of Appeals for the Ninth Circuit in *Ceniceros v. San Diego Unified School District*, the Justice Department argued that a student-organized and run bible club should be allowed under the Equal Access Act to hold meetings in the school during lunchtime. The school district had taken the position that the Equal Access Act only applies to before and after school uses of school property, and did not compel equal access to school facilities by student groups during the lunch hour.

Conclusion

Only time, and principled and concerted action, will tell whether the well-stated intentions and aspirations of this Administration in civil rights enforcement are realized in elementary and secondary education.

Endnotes

[1] The author acknowledges the assistance of three of her colleagues in the Education Group at Hogan & Hartson — Daniel Kohrman, Lori-Christina Webb, and Paul Minorini — in the preparation of this article, but the views expressed are hers alone.

[2] The Washington Post, Oct. 26, 1994, at A1.

[3] 347 U.S. 483 (1954).

[4] The Department has changed course in other civil rights cases that do not affect elementary and secondary education quite as directly. For example, reversing the position taken by the Bush administration, the Justice Department filed briefs in May 1993 with the U.S. Supreme Court in ***Landgraf v. USI Film Products*** urging the Court to declare that the 1991 Civil Rights Act — which made it easier for employees to win job discrimination suits under Title VII — applies retroactively. The Supreme Court ultimately rejected Justice's position in its 1994 ruling.

[5] 832 F. Supp. 836 (D.N.J. 1993).

[6] *Id.* at 838.

[7] *Id.*

[8] *Id.* at 839.

[9] *Id.*

[10] *Id.* at 845.

[11] *Id.* at 840.

[12] *Id.* at 844.

[13] *Id.* at 849-51.

[14] 443 U.S. 193 (1979).

[15] 480 U.S. 616 (1986).

[16] The Washington Post, Nov. 12, 1994, at A9.

[17] 59 Fed. Reg. 11448 (March 10, 1994).

[18] 59 Fed. Reg. 11449 (March 10, 1994) (emphasis added).

[19] 498 U.S. 237 (1991).

[20] 112 S. Ct. 1430 (1992).

[21] *E.g.*, "As [this Court has] long observed, "local autonomy of school districts is a vital national tradition." ***Freeman***, 112 S. Ct. at 1445 (quoting ***Dayton Bd. of Education v. Brinkman***, 433 U.S. 406, 410 (1977); ***Dowell***, 498 U.S. at 248 (discussing "the important values of local control o[illegible]ublic school systems").

[22] Motions for unitary status already are pending in a number of cases in which the United States is a party, such as ***Liddell v. Missouri***, No. 72-100-C(6) (E.D. Mo.) (the St. Louis school desegregation case).

[23] No. 93-1823, October Term 1994. The author is one of the counsel for Respondents in the ***Jenkins*** case.

[24] Named for the Supreme Court's decision in Milliken v. Bradley, 433 U.S. 267 (1977), in which the Court explicitly approved for the first time the appropriateness of educational programs as part of desegregation remedies, the ***Milliken II*** relief in Kansas City provides such programs as reduced class size, summer school, and before and after school tutoring.

[25] *See* letter of Archie B. Meyer, Sr., to Palm Beach County School District, Complaints #04-87-1179 and #04-88-1288 (Sept. 23, 1994).

Chapter X

Minority Access to Higher Education

by Reginald Wilson

I. Introduction

Halfway through the Clinton Administration, the President's record on minority access to higher education can be described as decidedly mixed. There were some advances to be sure, but several retrogressions as well. Robert Atwell, president of the American Council on Education (ACE), puts it even more starkly: "During 12 years of Reagan and Bush, we got no money and no regulation. Now we are getting even less money and are being subjected to mind-numbing and senseless regulation. We are not a priority for this administration, for reasons both understandable and short-sighted."[1] The understandable reasons are apparently Clinton's campaign promises to give priority to lowering the deficit and bringing the recession under control. The short-sighted reasons are somewhat more complex.

The policies that are now emerging from the Administration are beginning to paint a complex picture of the views the President has about the way higher education will be structured in the near future. However, those policies have been frustrated in implementation due to delays in the appointment of key staff to critical positions in the Department of Education, and due to further delays caused by crises elsewhere in the nation and the world. But there have been crises in higher education as well, ranging from increased racial tensions on campus, skyrocketing tuitions, the breakdown of the accreditation process, to the implications of the forthcoming *Fordice v. Ayers* decision by the district court. All of these crises have consequences for minority access to higher education specifically, and for civil rights gains or losses in general.

This article will concentrate on the following topics: Reauthorization of the higher education funding for fiscal 1995, the National Service Program, race-based scholarships, racial harassment policies, the minority advisory commissions, and the implications these issues have for minorities in higher education.

II. Statistical Trends

A. High School Completion Rates

As reported by the American Council on Education, "In 1992, Hispanics experienced their largest single-year increase in high school completion rates in 20 years."[2] This left Hispanics still lagging considerably behind whites and blacks, but measurably improved at 57.3% versus 52.1% in 1991. The white rate showed a slight increase of 83.3%, from a drop of 81.7% in 1991 as measured against a rate of 82.5% in 1990. Nevertheless, the white rate has remained virtually stable for 20 years when it was 81.7% in 1972.[3] African Americans, on the other hand, have shown remarkable improvement in the 20 year span, rising from 66.7% in 1972 to 74.6% in 1992 (a slight drop from 75.1% in 1991).[4]

The increase in all three groups was primarily due to the high school graduation attainment of women, but this was markedly so in the case of African American and Hispanic women, and stresses the continued necessity of special programs targeted to minority males.

It is hoped that the Clinton Administration will extend annual high school data collection to Asians and American Indians, but there is little likelihood of this happening, given the constraints on funding. However, the general impression is that Asians graduate at a somewhat higher rate than whites and American Indians fall below the rate of other minorities.

B. College Participation Rates

"Despite some progress both this year and over the past four years, Hispanics and African Americans still are less likely than whites to participate in postsecondary study."[5] However, all groups (except Asians) declined in college participation during the early Reagan years, then recovered during the late Eighties with, again, women showing the greatest growth in all ethnic groups. The participation rate for 18-to-24-year old high school graduates in 1992 was: whites, 42.2%; blacks, 33.8%; and Hispanics 37.1%.[6] As indicated, Hispanics do relatively well in college participation once they graduate from high school; their biggest problem is the tremendous dropout rate from secondary school. African Americans, on the other hand, while making strides in high school completion rates, have the lowest college participation rate.

Nevertheless, by 1992, all groups had attained record enrollments in higher education, reflecting the fact that all groups had gotten the message that higher education was the key to greater employment opportunities. However, the rising cost of tuition — which was twice the rate of inflation — was becoming such an onerous burden on lower class minorities, that it was becoming increasingly difficult for them to stay in college once they got there.[7] The six year graduation rate was: Asian 64%; white, 56%; African American, 32%; and Hispanic, 41%. This low graduation factor is corroborated by modest increases or stagnation in degrees attained despite the record enrollment increases, and points to the necessity of stressing greater increases in grants, as opposed to loans, in order to retain minorities in college.

C. Degrees Conferred

While African American undergraduate enrollment increased 24.6% between 1982 and 1992, associate degrees awarded increased only 6.6% overall, and African American men actually declined in the number of associate degrees awarded, by 4%. Hispanics increased 87.3% in community college enrollment but increased only 36.3% in associate degree attainment.

Asians, on the other hand, increased 82% in enrollment and increased their associate degrees awarded by nearly 60%.[8]

At the bachelor's level, black enrollment grew by nearly 30% between 1982 and 1992, but degree awards advanced by a mere 7.7% and, again, African American men lost ground by a nearly 1% decline in degrees awarded. Hispanics did much better at the bachelor's level, increasing 79% in enrollment and gaining nearly 68% in degrees awarded. But a cautionary note to remember: most Hispanics (57%) are in community colleges. Asians at the four year level again did well, with an 112% increase in enrollment and a 121% increase in degree attainment. But this again points to the necessity of obtaining disaggregated within-group data. While the majority (Chinese, Japanese, and Filipino) groups are doing well, the Laotian, Cambodian, and Vietnamese groups are doing poorly at the secondary level and are also underrepresented at the higher education level.[9]

American Indians, though underrepresented at the four year level, stabilized with a 41% increase in enrollment between 1982 and 1991, and a 38% increase in bachelor degrees attained.

Whites, meanwhile, gained 11% in community college enrollment and were awarded 11% of the degrees. At the four year level, they gained 7% in enrollment and 12% in bachelor degrees awarded.

The foregoing description on low degree attainment is equally true for the historically black colleges and universities (HBCUs) as much as for the predominantly white institutions, where data shows that, despite enrollment increases between 1981 and 1991, degree awards to African Americans by the

HBCUs have declined at every level: associate, bachelor's, and master's — except the doctoral — during that same period.[10]

At the graduate and professional school levels, the picture is depressingly similar. Minorities, while underrepresented even more as master's and doctoral students, have made only modest increases in degree attainment. They represent only 11%, collectively, of the degrees awarded at the master's level, 7% of the doctoral degrees and 14% of the first professional degrees, while constituting more than 25% of the American population.[11] Frank Morris, dean of graduate studies at Morgan State University, has written a provocative paper showing that nonresident aliens are awarded almost as many master's degrees as all minority groups combined and more than five times as many doctoral degrees as all minority groups combined, as a result of getting preference on test scores and more favorable treatment in doctoral student grants. For example, nonresident aliens received 43% of their aid in grants as compared with black doctoral students who received only 27% of their financial aid in grants.[12] Morris says, "Clearly there are two things which really account for the lack of doctorates. One is the way the financing works that forces African Americans and Hispanics to go into debt. The second explanation is the departmental practices that limit opportunities for minority students."[13]

Policies should be enacted which reward institutions that give preference to domestic minorities over nonresident aliens. Institutions obviously have a duty to educate non-citizens, but their first obligation should be to American citizens: (1) whose taxes pay to support American colleges and universities, and (2) who contribute, through increased education and employment, to the vitality of America's economy.

The statistics cited here give evidence that much still needs to be done to achieve equality of educational opportunity for minorities in higher education. Not only must progress be made in access, but much progress will have to be made in degree completion. This means providing much more funding of innovative curriculum practices and support programs and expansions of grants, as opposed to loans, at the undergraduate and graduate levels.

III. Higher Education Funding

As we view President Clinton's record on funding for higher education, it is as mixed as his policy initiatives in education, containing some advances as well as some retrogressions. For example, the President recommended increased funding for TRIO programs, which certainly benefit minority students, by $28 million (which Congress raised to $45 million). But he simultaneously recommended more than $100 million in cuts in Pell grant funding (while Congress boosted the maximum grant from $2,300 to $2,340). The raise in the maximum grant combined with the cut in funding means that students who register for college late in August — usually minority and low-income students — may face a Pell grant shortfall. "It would hurt our policies of open access," says Melanie Jackson, director of federal relations for the Association of Community College Trustees.[14]

Other areas where the President's funding policies seemed to improve matters for minority students were: an increase in funding both for HBCUs and for Hispanic Serving Institutions; an increase in funding for the Office of Civil Rights; and an increase in Title III (institutional aid) funds, which go primarily to heavily minority student institutions.

On the other hand, President Clinton made funding cut recommendations that can be construed as hurting minorities: no recommendation for funding State Student Incentive Grants (although Congress partially replaced these funds); no recommendation for funding of women and minority participation in graduate education; and flat funding for Harris graduate fellowships.[15]

The higher education funding policies of the Clinton Administration will make advances for minorities more difficult despite appointed officials being "more able" than their predecessors and more "accessible and instinctively sympathetic to our cause."[16] Despite good personal relations with the Clinton Administration, the higher education community feels that cuts in need-based student aid and eliminating of funding for minority graduate education nevertheless restricts its ability to serve minorities. The Administration cites last year's budget agreement, which froze discretionary domestic spending for five years, as excuses for their policies; but this justification does not sit well with the higher education community, which sees the Administration somehow finding resources to fund its national service initiatives and multifold funding growth in its School-to-Work programs.[17]

Ironically, while the Clinton Administration has put into place a friendlier, more accessible, group of educational officials than was true under Presidents Reagan and Bush, they preside over a set of funding policies that will ultimately restrict minority access and retention in higher education.[18]

IV. National Service Program

The National Service Program was one of the most touted new initiatives of the incoming Clinton Administration. It would provide hundreds of thousands of young people to eagerly do volunteer work in social service agencies and with the homeless, who would, in return for their generosity, receive minimum wages and health benefits, but more importantly, grants to attend college for two years or pay off debts for college already attended, or some other job training.[19] The higher education community responded enthusiastically to this proposal, which reinforced its long-standing efforts to encourage "their students to volunteer their services to local communities."[20] Moreover, the President recognized parents' increasing concern about being able to afford to send their children to college and to pay off the increasing loan burden they incurred once there.

However, enthusiasm for the program began to wane as several unanswered questions began to be raised. First, the program's modest scope will affect relatively few students. Initially taking 20,000 volunteers, it is projected to grow to 100,000 by 1997 at a cost of $3.4 billion.[21] Although the program involves more people already than its predecessor, the Peace Corps, it only affects a small part of the 14 million students currently in higher education. Therefore, the ability of national service to relieve a substantial portion of student debt is very minuscule. The reality is that the "overwhelming majority of student borrowers will have to repay loans."[22] More than five million students use Stafford Loans to finance their education. Less than 2% of them will be able to pay back their loans with national service; the other 98% will not be affected.

Second, it is doubtful that enough meaningful jobs can be found for these volunteers without encroaching on the already limited jobs available to work-study students or affecting workers already in the labor force. Administration officials are aware of these problems and are studying ways to avoid them.

As exemplary as this program is, it will in no way relieve the increasing financial burden on most students and particularly most minority students. The only way this could have been done was to significantly raise the maximum grant award or to make the Pell grants an entitlement program. However, the President has opted not to do either, and has instead retreated from adequate funding of the Pell program.

V. Filling Vacancies

One of the higher education community's continuing frustrations with the Clinton Administration has been the confusion generated by the Administration's withdrawal of some of its original nominations to key appointments, resulting in an agonizing delay in filling many critical positions.

Many key positions remained unfilled until nearly into the halfway point of the Clinton Administration, therefore limiting their effectiveness in policy determination and direction. This was especially true in the Education Department. Percy Bates, who ran the Office of Special Education in the Carter Administration, commented, "I don't think it's due to a lack of [qualified] applicants."[23] Among Clinton's late appointments to fill key vacancies in the Department of Education, were Augusta Souza Kappner, president of the Borough of Manhattan Community College, to be Assistant Secretary for Vocational and Adult Education; and Norma Cantú, an attorney with the Mexican American Legal Defense and Education Fund, to be Assistant Secretary of Education for Civil Rights.[24]

Cantú said, shortly after assuming office, "I have about 18 months to do my job."[25] And she inherits a full plate of issues with which to contend in a fairly short time: direct student loans, race-based scholarships, revised guidance on internal procedures for the department, higher education desegregation, fairness of standardized tests, and "a vacuum of 12 years of [policy] non-enforcement."[26]

Appointments that were particularly gratifying to the minority community were the naming of Alfred Ramirez to head the White House Initiative for Hispanic Education, and Catherine Le Blanc to direct the White House Initiative for Historically Black Colleges and Universities. Clinton also appointed nominees to the National Advisory Council on Indian Education.[27] It remains to be determined if these advisory bodies will have any significant impact on Administration policies.

The delay in filling key vacancies has not only left Administration officials a short time in which to point a clear direction in higher education policy formulation but, in their haste to catch up, has resulted in the enactment by these officials of some questionable regulations and policies that have angered and confused their friends in the higher education community.

VI. Policies Causing Confusion

The fact that there is no clear-cut policy direction by this Administration regarding minorities in general, and higher education specifically, has left the leaders of colleges and universities confused and frustrated. For example, President Clinton's support of a crime bill that prohibits Pell grants to prisoners, takes away recreational equipment from inmates, and expands the death penalty, is seen as particularly punitive to minorities (who make up an inordinate share of the nation's prisoners), without having any appreciable impact on the crime rate. In addition, the Office of Civil Rights published procedures for initiating an investigation of racial harassment that seemed to the higher education community to be so vague as to dangerously infringe on First Amendment rights. Sheldon Steinbach, General Counsel for the American Council on Education, said the policies "fail to distinguish between permissible speech and discriminatory conduct."[28] Peggy Elliott, president of the University of Akron, said, "Given that we want to obey the law and not break it, the new guidance [on racial harassment] poses a problem.[29]

Also, the Department of Education, in an attempt to implement the requirements of the Higher Education Amendments of 1992, has "imposed a huge new set of regulations on colleges and universities."[30] By failing to accomplish any one of 11 "triggers," institutions would be subject to a massive review of their entire organization by their State Postsecondary Review Entity (SPRE). Since the SPREs are the existing state higher education agencies, the failure to file a student aid audit, for example, could trigger a top-to-bottom examination of the institution by the state and would give it a license to intrude in institutional matters not currently required by law.[31] Already, letters have gone out to more than 1,000 colleges and universities alerting them that they "could experience such a review."[32]

One area covered by the new regulations that especially disturbs the higher education community deals with the ability of SPREs, in conducting an audit of an institution, to raise questions about minimum standards for graduation rates and pass rates on state licensure examinations.[33] This would seem to favor an accountability that minorities have long asked of institutions. However, the higher education community is quite right to point out that this provision gives state agencies intrusive powers that the law currently does not grant them, giving agencies a hunting license for all kinds of matters they currently have no right to breach institutional autonomy to question. But the matter of student outcomes is a legitimate one for which to hold institutions accountable, particularly with regard to minority students whose intention and graduation rates are disgraceful. Ways should be found to make institutions more accountable for student outcomes. While the SPRE process does not seem to be the legitimate vehicle for such accountability, the Department to Education should not drop this important issue, but should instead look elsewhere for its resolution.

Another regulatory recommendation that seemed to go contrary to intended policy concerned the Equal Employment Opportunity Commission's staff recommendation to discontinue collecting EEO6 data as a cost saving measure. Since the data collected annually on the EEO6 form is the only means of tracking statistically the progress (or retrogression) of minorities in college and university faculties, the small cost saving would have come at incalculable loss to minorities. In this case, fortunately, an outcry from the higher education associations ensued, and the EEOC voted down the staff recommendation, but nothing is to prevent such a short-sighted recommendation in the future unless staff are clearly apprised of the Administration's policy intentions.

Another Clinton proposal receiving mixed reviews is a plan to prevent minorities and others from defaulting on loans by stretching the loan payments out over 25 years, making the payments smaller in the short run.[34] The current policy requires repayment in 10 years. However, some college officials have criticized the proposal, saying it would hurt minorities rather than help them. For example, stretching payments over 25 years could compound the interest and result in the payments more than doubling the cost of college.

In sum, there appears to be no clear-cut policy direction in civil right matters. Indeed, there is no White House appointee designated to advise the President on civil rights matters. At this point, many education policies affecting minorities are confused and contradictory and, as a result, may ultimately do more harm than good.

VII. Race-Based Scholarships

One policy area where the Clinton Administration seemed to act swiftly and surely was in the area of race-based scholarships. In the waning months of the Bush Administration, Michael Williams, the Assistant Secretary for Civil Rights, startled the higher education community by declaring that the proceeds of the 1990 Fiesta Bowl could not be designated for minority exclusive scholarships.[35] Moreover, he said, all such scholarships violated Title VI of the 1964 Civil Rights Act. The higher education community, which offered several such scholarships at colleges and universities, was thrown into a quandry. Lamar Alexander, who was appointed Secretary of Education shortly after Williams' pronouncement, temporarily withdrew the policy and requested written comments on the legality of such scholarships. Although the overwhelming majority of the comments supported such scholarships, the Department issued a Policy Guidance that declared minority scholarships illegal unless they were necessary to overcome past discrimination. No final Guidance was issued.

When President Clinton was elected, one of his first appointees was Richard Riley as Secretary of Education. During his confirmation hearing, Riley said he would reverse the Bush Administration's minority scholarship policy upon assuming office. One of his first actions was doing "an immediate about-face on the minority scholarship issue."[36] Secretary Riley ordered the General Accounting Office to expedite its study of race-based student aid (originally commissioned by Bush Secretary Lamar Alexander) and sent a letter to college presidents that he was "committed to ending the confusion ... on the issue of race-based scholarships."[37] President Clinton announced in an address to the 1994 ACE Annual Meeting, "We have lifted the cloud on minority scholarships."[38]

In another development, Hispanic student Daniel J. Podberesky filed a lawsuit challenging the University of Maryland with violating his civil rights under Title VI of the 1964 Civil Rights Act, for denying him a scholarship under the Benjamin Banneker Scholarship Program, because it was set aside for black students in an attempt to remedy past discrimination.[39] The district court upheld the legality of the Banneker Program and found in favor of the university. On appeal, the Fourth Circuit, containing a majority of Reagan and Bush appointees, remanded the case back to the district court to determine "whether present effects of past discrimination exist and whether the remedy is a narrowly tailored response to such effects."[40]

Despite providing voluminous statistical proof to the district court that the university still suffered the present effects of past racial discrimination, the Fourth Circuit ruled, "There is no doubt that racial tensions still exist in American society, including campuses ... However, these tensions and attitudes are not sufficient ground for employing a race-conscious remedy at the University of Maryland."[41] Although the ruling only covers the five states of the Fourth Circuit's jurisdiction, it sets an ominous precedent. The university has said it will appeal.[42] In the meantime, this decision cannot help but have a chilling effect upon the continued effectiveness of such programs on campuses throughout the country.

VIII. Higher Education Desegregation

Desegregation of higher education has had as tortured a history as the desegregation of K-12 education, and has experienced some of the same failures and successes. The principal problem has been, in both instances, that the focus of the courts has been on the appropriate mix of bodies, rather than on improving the quality of education wherever those bodies found themselves, the original impetus propelling the *Brown* litigation. Reverting to that original impetus will require a new direction in desegregation thinking, requiring systematic and comprehensive plans from the states. "[Such a] plan would explicitly recognize the relationship between minority access and minority experiences in K-12 systems and consequently address kindergarten through graduate and professional education."[43] Treating education as a seamless web from kindergarten through graduate school will revolutionize thinking about desegregation for both K-12 and higher education.

Norma Cantú has vowed to emphasize these goals and recently stressed that, unlike the Bush Administration, she has vowed to keep open the higher education desegregation plans of every state that does not meet its goals. She will "expand to higher education the principles of *Brown*" and will insist that "the equal burden of desegregation will be equally shared" between historically black institutions and predominantly white institutions.[44] This would, indeed, be a new direction for desegregation, and we look forward eagerly to its implementation.

Following the 1954 *Brown* decision, higher education made little change in its practices of segregation until the *Adams* decision of 1973. The 17 states that had dual systems of higher education were required to file plans in 1980 detailing how they would desegregate their student bodies, their faculties, their administrations, and their governing bodies. Since these plans came under the jurisdiction of the Reagan Administration, they were enforced with minimal aggressiveness. And when they expired, only Delaware and Kentucky (the least populous states for African Americans) had met their goals. Yet, the Bush Administration favorably closed all state plans, claiming that they had made "good faith efforts." It is these plans that Assistant Secretary Cantú has vowed to keep open and monitor if the states have not met their desegregation goals.[45]

However, the desegregation case that is receiving the most attention at the moment is the Mississippi case, *U.S. v. Fordice*, which has been in litigation since 1975. The reason Fordice is so important is because no higher education desegregation case has ever before reached the U.S. Supreme Court. The *Adams* case was decided by the D.C. District Court, and upheld by the D.C. Circuit. Neither side appealed to the Supreme Court.

The *Fordice* case, first filed in 1975, charged the state of Mississippi with operating a dual segregated system of higher education. Upon appeal, the Supreme Court found in favor of plaintiffs and remanded the case back to the district court for a decision as to how the dual system should be dismantled. The district court requested the Board of Trustees of State Institutions of Higher Learning (IHL) and the plaintiffs to agree on a plan for desegregation.[46] The parties could not agree and submitted separate plans to the court. The IHL plan recommended closing Mississippi Valley State, an HBCU, and merging it with Delta State University, a predominantly white institution. The Department of Education, which submitted an *amicus* brief, recommended enhancing and adding new programs to the HBCUs. Whatever the lower court's ruling, it is sure to be appealed again to the Supreme Court.[47]

This case is extremely important because of diverse rulings in similar cases in Louisiana and Alabama. If the *Fordice* case is decided at the Supreme Court level, it will provide guidance for the other two cases and for higher education desegregation throughout the South. Thus, we may get some consistent direction, for good or ill, regarding the Supreme Court's philosophy of higher education desegregation.

IX. Conclusions and Recommendations

The Clinton Administration, midway through the term, has shown itself to be confused and ambivalent in civil rights, as measured particularly with respect to increased minority access to higher education. Some of the Administration's policies seem ultimately destined to hurt such access, in particular its recommendations for cuts in funding grants at both the undergraduate and graduate levels. The Administration was late in making several key appointments in education, and in their haste to catch up, the appointees have made several ill-considered policy recommendations that have angered the higher education community and set that community at odds with an Administration toward which there were initially some high expectations. There have been some positive recommendations as well, but these tend to be overshadowed by the Administration's confused and ambiguous policy directions.

With the upcoming midterm elections, it is expected that the party in power will lose several seats in Congress. Therefore, it is even more imperative that the Administration show a strong, certain and clear sense of direction in support of civil rights, and in support of minorities seeking greater access to and success in higher education.

Endnotes

[1] Robert H. Atwell, *President's Letter*, American Council on Education, August 24, 1994, p.1.

[2] Deborah J. Carter and Reginald Wilson, *Minorities in Higher Education: Twelfth Annual Status Report*, American Council on Education, Copyright, 1994 (hereinafter 1994 Status Report), p. 1.

[3] *Id*., p. 44.

[4] *Id*., p. 45.

[5] *Id*., p. 1.

[6] *Id*., pp. 44-45.

[7] *Price of Higher Education Becomes Even Dearer*, NEW YORK TIMES, September 8, 1994, p. B8.

[8] Carter and Wilson, *1994 Status Report*, Op. Cit., pp. 52-55.

[9] *Id*., p. 54.

[10] Carter and Wilson, *1994 Status Report*, Op. Cit., pp. 58-59.

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[12] Kathleen Kennedy Manzo, *Institutional Support Essential to Boosting Number of African American Doctoral Students*, BLACK ISSUES IN HIGHER EDUCATION, July 14, 1994, p. 46.

[13] *Id*., p. 46.

[14] Charles Dervarics, *Spending Bill Provides HBCU Gains, Pell Grant Cap*, BLACK ISSUES IN HIGHER EDUCATION, July 14, 1994, p.6.

[15] *Budget Tables*, EDUCATION DAILY: SPECIAL SUPPLEMENT, Vol. 27, No. 190, October 3, 1994, pp. 1-6.

[16] Atwell, *President's Letter*, Op. Cit., p. 1.

[17] *Id*., p. 1.

[18] *Id*., p. 3.

[19] Robert Atwell, *National Service and Educational Opportunity*, BLACK ISSUES IN HIGHER EDUCATION, March 25, 1993, p. 112.

[20] *Id*., p. 112.

[21] *Id*., p. 112.

[22] *Id*., p. 112.

[23] Mary-Christine Phillip, *Welcome Change for Department of Education Tempered by Pace of Staffing Announcements*, BLACK ISSUES IN HIGHER EDUCATION, Feb. 25, 1993, p. 9.

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[25] In a speech to the Higher Education Group, Washington, D.C., Oct. 4, 1994.

[26] Charles Dervarics, *Senate Approves Patrick Nomination*, BLACK ISSUES IN HIGHER EDUCATION, April 7, 1994, p. 6.

[27] Washington Update, *Clinton Names Nominees-to-be To Indian Education Council*, BLACK ISSUES IN HIGHER EDUCATION, Aug. 25, 1994, p.6.

[28] Mary Jordan, *Colleges Decry New Speech Codes*, FRESNO BEE, May 1, 1994, p. 12.

[29] *Id*.

[30] Terry W. Hartle, *More Federal Regs to Choke On*, TRUSTEESHIP, Association of Governing Boards, July/August, 1994, p.6.

[31] Robert H. Atwell, *Putting Our House In Order*, ACADEME, July/August, 1994, p. 10.

[32] Atwell, *President's Letter*, *Op. Cit.*, p. 2.

[33] Hartle, *Op. Cit.*, p. 8.

[34] Mary-Christine Phillip, *Clinton's Plan to Revamp Loan Program Gets Mixed Reviews*, BLACK ISSUES IN HIGHER EDUCATION, July, 1994, p.8.

[35] Education Beat, Op. Cit., p. 4.

[36] Mary-Christian Phillip, *Welcomed Change for Department of Education Tempered by Pace of Staffing Announcements*, BLACK ISSUES IN HIGHER EDUCATION, Feb. 25, 1993, p.6.

[37] Letter from Richard Riley to all college Presidents (Mar. 4, 1993).

[38] Mary-Christine Phillip and Charles Dervarics, *Clinton Calls for Rigorous Academics, Practical Learning*, BLACK ISSUES IN HIGHER EDUCATION, Mar. 10, 1994, p. 11.

[39] *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991).

[40] *Podberesky v. Kirwan*, 956 F. 2d 2 (4th Cir. 1992).

[41] Robert E. Pierre and Peter Baker, *Black Scholarships Disallowed*, THE WASHINGTON POST, October 28, 1994, p. A1.

[42] *Id.*, p. A1.

[43] Robert Kronley, Chapter 4, *Governance and Accountability* (Draft, Unpublished), Sept. 15, 1994, p.2.

[44] Cantú, Speech, Op. Cit.

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[46] B. Denise Hawkins, *Landmark Miss. Case Sheds Light on Segregation at the Community College Level*, BLACK ISSUES IN HIGHER EDUCATION, Feb. 11, 1993, p. 12.

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Chapter XI

In Search of A Vision: Gender Equity in Education in the Clinton Administration

by Verna L. Williams, with assistance from Steven C. Hodge

> *"There's nothing lucky about being a girl...*
> *I wish I was a boy."*[1]

A puzzling statement for a fourteen-year-old Latina girl. After all, more young women complete high school[2] and participate in undergraduate and graduate programs than their male counterparts.[3] A myriad of protection for women and people of color is on the books. Women and people of color are Supreme Court Justices, cabinet officers, leaders in the corporate world. Seen through the prism of legislative milestones over the past thirty years, recent achievements of women suggest that we, indeed, "have come a long way" and cause some to question the need for a continued struggle for gender equity in education. However, as this young woman knows, numbers and anecdotal successes fail to tell the whole story.

The fact is, thirty years after the passage of the Civil Rights Act of 1964, and twenty years after the enactment of Title IX of the Education Amendments of 1972, gender equity in education remains elusive. Despite these historic legislative advances, sexism remains a powerful impediment to quality education for the vast majority of women and girls — for many, this barrier is compounded by race, ethnicity, or disability, among other immutable characteristics. As a consequence, for too many girls, attending school is tantamount to running a gauntlet — trying to avoid sexual harassment, striving to gain access to the full array of educational opportunities, attempting to overcome stereotypes imposed by curriculum. Simply put, the barriers to attaining an education are still quite numerous and imposing for women and girls, despite the fact that the passage of laws such as Title IX has enabled many to advance to levels unimaginable only twenty years ago.

As we examine efforts to ensure that educational institutions prepare our young people to meet the challenges of the next century, we also must work to dismantle these barriers to ensure that these institutions fulfill their obligations to provide a hospitable environment conducive to learning for all students. In this connection, gender equity should be a key part of efforts to reform the nation's schools. Although the Clinton Administration successfully has integrated measures to promote gender equity in its legislative program to reform the nation's education system, it has yet to demonstrate its commitment to this goal through the vigorous enforcement of existing civil rights laws that is necessary to make gender equity a reality in education. This article discusses the present status of women and girls in education, examines the Clinton Administration's recent school reform legislative initiatives and the extent to which they address gender equity issues, and explores the enforcement of existing laws under the Clinton Administration.

I. Status of Women and Girls in Education

The assessment of conditions for women and girls in education is mixed: although significant strides have been made, substantial impediments continue to keep true equality of opportunity out of reach for many. For example, women have surpassed men to make up 56% of students enrolled in undergraduate institutions;[4] however, women remain relegated to traditional majors, leading to careers in which they continue to earn less than their male counterparts. Specifically, an examination of the degrees granted by sex in the past year demonstrates that men are overrepresented in high-paying fields, such as engineering and business management (receiving 79% and 53% of the degrees, respectively), which lead to top salaries for recent graduates.[5] Thus, even for today's educated women, the persistence of sex segregation contributes to entrenchment of the wage gap, as women remain in fields that lead to lower-paying jobs.

While some may argue that the issue here is women's preferences, an examination of the forces that shape women's options provides insight into how sexism at the elementary and secondary level generally limits the horizons of girls and young women, which, in turn, limits their opportunities as adults. The barriers to women and girls attaining a quality education surface well before they select their majors in college: sexual harassment, biased standardized tests, underrepresentation in math and science programs, adolescent pregnancy, and inequality in vocational education and athletics programs, for example, are pervasive throughout the educational system. The intransigence of these barriers has a profound impact upon young women, limiting their opportunities, diminishing their self-esteem, and, in the long run, affecting their ability to earn a living. Such impediments inhibit young women from reaching their potential and, consequently, from making their fullest contributions to American society.

A. Sexual Harassment

> *After a rehearsal of a school play, Amy says, Bradley came into the area where she was changing. He approached her from behind and slid one hand languorously up her leg, lifting the hem of her slip. Then, he began to slide his other hand under her shirt toward her breast. "I didn't know what to do," she tells me later, "I just stood there. I couldn't even say anything. I didn't want him to do it, but it's like I couldn't talk."*[6]

Sexual harassment is pervasive in schools, affecting girls as well as boys. According to a study commissioned by the American Association of University Women (AAUW) Educational Foundation, 81% of students surveyed had experienced some form of sexual harassment, with girls experiencing harassment at a slightly higher rate than boys — 85% versus 76%, respectively.[7] Although the gap between girls and boys experiencing harassment was rather narrow, girls reported that their experiences had a stronger emotional impact on them, causing many to lose interest in school and diminishing their academic performance.[8] Far from being an aberration, sexual harassment is a daily event for many girls and young women.[9] In addition, harassment can be found in every level of education — from elementary school to postgraduate programs. For example, African American girls reported experiencing harassment even before reaching grade six.[10] The data demonstrate that sexual harassment has become a part of school culture, poisoning the atmosphere for children, with particularly dire consequences for girls and young women.

The detrimental effects of sexual harassment are only compounded by schools' failure to have policies and procedures in place to address this issue meaningfully. For example, only 8% of the respondents to a study conducted by the NOW Legal Defense Fund and Wellesley College Center for Women reported that their school had and enforced a policy on sexual harassment.[11] The absence of a policy is significant, as schools without policies are less likely to take action against an alleged harasser: schools with policies took action in 84% of cases, as compared to schools without policies doing so only 52% of the time.[12] In light of most schools' reluctance to address this issue in terms of implementing specific policies or curricula, it is not surprising that girls and young women are reluctant to tell a teacher or school administrator about the harassment[13] — the only consequence of their taking a stand is likely to be retribution and even more harassment. Thus, just as Amy, girls "can't talk" about sexual harassment. For girls who have experienced sexual harassment, their silence is symptomatic of their alienation from schools that do nothing to address the misconduct.

B. Inequality in Standardized Testing

(Fill in the blanks from the five pairs of choices below):
Although the undefeated visitors ____________ triumphed over the underdog opponents, the game was hardly the ___________ sportswriters had predicted."

A) fortunately .... upset
B) unexpectedly .... classic
C) finally .... rout
D) easily .... stalemate
E) utterly................. mismatch[14]

Questions evincing a cultural and gender bias, such as this one, provide some insight into why the gender gap between boys and girls taking standardized tests such as the Scholastic Assessment Test (SAT) persists. This sports question appeared on the 1987 SAT, and apparently stumped the majority of girls taking the test: only 16% of them chose (C), the right answer; 41% of boys taking the test did so.[15] Although girls get better grades in high school and college than boys,[16] girls consistently score below boys on standardized tests. For example, in 1993, boys scored an average of eight points higher on the verbal portion of the SAT and 45 points higher on the math section of that test.[17] The gap in male and female scores on the SAT is replicated in a variety of contexts, with serious implications for the opportunities available to girls and young women.

Mastery of standardized tests can be the key to gaining access to college, athletic scholarships, or vocational training programs.[18] These tests are used in every level of school, starting as early as kindergarten,[19] where they are used to evaluate young students and, in some instances, to determine which children will be tracked into talented and gifted programs.[20] Thus, throughout the educational system, standardized tests are used to determine which children will be able to take advantage of a variety of benefits that can impact their future as wage earners, a disturbing proposition in light of the flaws inherent in these assessment tools.

The evidence of the weaknesses of standardized tests is significant. For example, several studies have documented the racial, ethnic, and cultural biases intrinsic to these tests.[21] In addition, the evidence of gender bias is strong. Studies show that males, irrespective of class and race, consistently outscore similarly situated females[22] — this, in light of the fact that girls perform better than boys in school. This disparity is powerful evidence that such tests come up short as measures of academic accomplishments of students. Moreover, since girls go on to receive better grades in college, these tests also are flawed as an indicator of future performance. Nevertheless, the SAT and PSAT, among other tests, are a crucial part of the college application process, playing a critical role in determining which college one attends and whether one receives scholarship money. For example, boys get the lion's share of scholarships based on their test scores, receiving an estimated $15 million of the $25 million awarded each year by the National Merit Scholarship Corp.[23]

Despite these grave inadequacies, these tests and others continue to be staples in measuring students' progress and predicting their future capabilities. The biases inherent in these tests make them imperfect assessment tools, at best, that circumscribe the opportunities and ultimately impact upon the earning power of young women.

C. Underachievement and Underrepresentation in Math and Science

I want to do good in school and be proud of myself. I don't want to be a lazy bum. And I'll need math when I'm older. There's math in everything, no matter what, so it's important to learn. So I know I should have a better attitude, but I just want to give up. It's not that I don't try, it's just that I don't believe in myself and I don't get it.[24]

By high school, many girls do "just give up" on math and science based in part on their belief that they, just as this young woman, are not equipped to handle the rigors of these two disciplines. As a consequence of this misapprehension, young women forego the opportunities to pursue careers in these fields, with many girls opting not to pursue careers as professionals in any field.[25]

The gender differences in math and science start out small and grow as students approach secondary school.[26] In terms of problem-solving abilities, girls and boys are relatively evenly matched in elementary school.[27] By high school, their abilities, as measured by standardized tests, differ dramatically as illustrated by the 45-point gap in math SAT scores discussed above. Similarly, in science, girls and boys perform at similar levels until they reach high school level, when males outscore females, despite the fact that girls receive better grades. Girls also tend to participate in math and science classes at lower rates than their male counterparts. More specifically, as math courses become more advanced, dealing with such topics as calculus, they tend to become more populated by male students.[28] Similarly, in the area of science, female participation is low in such advanced courses as physics or advanced chemistry.[29] When young women do enroll in advanced science classes, they gravitate toward biology.[30] In sum, as girls advance through the educational system, their achievement and interest in math and science courses wanes significantly.

This divergence in achievement and participation rates likely is tied to the fact that girls' attitudes toward math and science tend to become more negative as they approach secondary school. During elementary school years, girls are more positive about math than their male counterparts.[31] Once girls reach middle school, however, this attitude declines, and by high school, boys have a significantly better attitude toward math than do girls.[32] In addition, by this time, girls start to doubt and underestimate their mathematical capabilities,[33] even when this belief is not supported by their performance in classes.[34] The sources of these negative attitudes are many. Significantly, teachers have diminished expectations for girls' achievements in math than for boys, starting as early as in the first grade.[35] Lowered expectations for girls may be rooted in the stereotype that boys perform better in math and science, views that also are pervasive among students. For example, many girls and students of color are steered away from math and science because of the belief that math and science are domains reserved for white males.[36] Studies have shown that girls who saw themselves as "feminine" tended to view science as "masculine" and, therefore, not appropriate for them pursue.[37] Other studies demonstrated that girls are more likely than boys to view math as useless to their personal lives, an attitude that increases as girls progress toward high school.[38]

The underachievement and underrepresentation of girls and young women in math and science programs have important implications for the career path they pursue as adults. For example, women comprise only 8% of the nation's engineers and only 16% of scientists.[39] Less obvious, however, is the impact the perception that math and science is reserved for one group has on young women. Stereotypes concerning which subjects properly are "feminine," expectations on the part of instructors that girls generally will not fare well, and the diminished self-esteem that leads girls to doubt their competence even when their grades indicate otherwise combine powerfully to teach girls that their options are severely limited. Thus, girls who eschew math and science also are less likely to pursue professional careers and therefore, less likely to be prepared to enter positions that will provide them with the earning potential necessary to support their families as adults.

D. Teenage Pregnancy

> *[S]ome school administrators regard visibly pregnant students as "morally inferior as well as intellectually and socially disadvantaged . . . For example, one junior high school principal said: "A diploma will make no difference to these girls."*[40]

This attitude underlies discrimination against pregnant and parenting teenagers, such as prohibiting them from being inducted into the National Honor Society, or excluding them from certain courses.[41] Such policies can violate Title IX,[42] and impose yet another barrier to their completing high school, leading ultimately to a life where they and their children are more likely to live in poverty.[43]

Removing the impediments to education for pregnant and parenting teens is essential since their numbers continue to burgeon each year. Fully one million adolescent women get pregnant annually, with women aged 15 to 19 comprising 12% of that population.[44] Pregnancy is a more frequent occurrence among young women of color. The birthrate for black women aged 15 –19 is 19%, compared to 13% for Latinas, and 8% for white teens.[45] In light of research indicating that teen pregnancy is an outcome of poverty and other the societal disadvantages,[46] the expansion of teen pregnancy is not surprising since poverty rates have been increasing over the past twelve years. Young women from poor families are already at risk for dropping out of school, notwithstanding pregnancy; having a baby only increases the likelihood that they will not complete their high school education. With limited educational background, these girls and young women are much more likely to be poor later in life than are women who give birth after age 20.[47]

With the odds already stacked against them, pregnant and parenting teens that seek to complete their schooling frequently face additional obstacles from school administrators. Teen parents frequently are seen erroneously as a "lost cause" or a "bad influence." Thus, to mitigate the impact of having a pregnant adolescent in class, a school may opt for creating a separate, and usually lesser, program for such students, for example. As the number of these students continues to increase, however, these actions, in addition to being discriminatory, will prove to be counterproductive, as the excluded students are being prevented from obtaining the skills necessary to support themselves and their families.

E. Inequality in Vocational Education Programs

> *When asked why so few girls participated in the nontraditional job training programs, such as construction, one administrator reasoned, "Since the work is associated with being dirty, girls generally aren't interested.*[48]

Beyond being stereotypic, the notion that young women prefer jobs that enable them to keep their hands clean and their nails immaculate helps perpetuate the extensive sex segregation that plagues vocational education. Women continue to be tracked into traditional fields, such as cosmetology or nursing. Men, on the other hand, are directed into areas such as construction, or repair technology, fields that historically have provided higher wages and greater opportunities for upward mobility — in short, a better life. Studies suggest that women of color do not even see vocational education as an option for them.[49] In sum, the vocational education system has a long way to go in order to provide parity for women and thus, equalize opportunities for all students seeking this type of training.

Sex equity programs have gotten little attention in the vocational education system.[50] Accordingly, sex segregation continues to be a fact of life in secondary and postsecondary job training programs. An examination of the instruction provided students demonstrates that, from the outset, students are presented with a powerful message regarding which fields are open to them and which fields are not. Specifically, women teach 98% of consumer and homemaking courses and 69% of office occupations classes, traditionally female courses of study.[51] In contrast, women instructors are far more scarce in the nontraditional areas. Only 4% of industrial arts instructors are women. People of color are concentrated in the home economics area.[52] In agriculture and trade and industry classes, women comprise just 6%and 9% of instructors, respectively.[53] Not surprisingly, young women gravitate toward those fields that they believe will be hospitable to them, as represented by the presence of a role model, such as a teacher, working in that area.

In addition to the dearth of role models for women interested in pursuing nontraditional occupations, young women frequently face overt sexism and harassment when they do opt for such a course of study. For example, a study of Connecticut middle school programs found that girls in vocational education noted that male students in the technical education course program frequently tried "to take over" group projects and ridiculed girls using the equipment. Moreover, instructors were aware of these behaviors and the impact they had on the female students, yet they did nothing to stop them. As a result, many girls chose not to continue taking technical education courses rather than deal with the negative attitudes of male classmates or indifference of instructors.[54] Thus, the absence of women in the nontraditional fields, coupled with the hostility to women in those fields, only serves to steer young women away from these opportunities.

In relegating young women to traditional fields, the existing vocational education system ultimately is consigning women to jobs requiring few skills and providing them and their families with a limited means of support. For example, the General Accounting Office found that women comprised 90% of apprenticeship programs in cosmetology, which pays an average wage of $247 per week. In contrast, women represented only .5% of apprenticeships in trades such as car repair, which pays an average wage of $717 per week.[55] A recent study of young people graduating from high school and entering the workforce shows that women earned wages that were, on average, 25% less than their male counterparts.[56] More specifically, about half of the women studied worked in fields that were traditionally female, earning an average of $338 per week. Sixty percent of the men worked in male-dominated positions, earning an average of $448 per week. Clearly, steering women into the traditional fields limits their earning power significantly. Even more noteworthy, however, is the fact that the nontraditional fields also offer greater chances for advancement — the difference between getting a job and having a career.

F. Inequality in Athletics Programs

> *If I hadn't been able to play basketball, I would not be in college today. I come from a family of 13 children and we just couldn't afford college. Without this scholarship, I would be working during the day and going to night school right now. And without Title IX, there would be no scholarship. Title IX has made all the difference in the world to me.*[57]

Indeed, Title IX *has* made a significant difference for many female athletes, such as the young woman quoted above. For example, when Title IX was enacted in 1972, only 4% of girls participated in secondary school athletics. Fifteen years later, in 1987, girls' participation rates had expanded to 26%.[58] Despite this dramatic increase, girls and women do not receive their fair share when it comes to opportunities to enhance their education with athletics. Boys' participation in secondary schools is twice that of girls.[59] Participation rates for girls of color is particularly low.[60] At the post-secondary level, women are seriously underrepresented in athletic departments, even though they comprise over half of undergraduates in colleges and universities across the country. In short, discrimination in athletics is still pervasive for women and girls, denying them the educational benefits and opportunities to finance their higher education that are widely available to men.

The struggle for equity in athletics has been ongoing since Title IX was enacted in 1972. Now, more than twenty years later, stereotypes and misconceptions about women's interests and abilities continue to influence institutional policies and deny girls and young women at all educational levels the opportunity to participate in the full array of athletics programs available to their male counterparts. These stereotypes manifest themselves in the separate and unequal programs for girls and women, characterized by inferior equipment, tattered uniforms, limited access to athletics facilities, and limited opportunities to receive athletic scholarships. Even though women are over half of the undergraduate student population, they comprise only 30% of college athletes and receive only 33% of scholarship dollars. Just 24% of sports budgets is dedicated to women's programs — only 18% goes to recruiting.[61]

Educators recognized long ago that athletics is an important complement to all students' education. Women's colleges acknowledged that sports helped "balance" academic activities as early as 1860.[62] Today, it is widely understood that participation in athletics has a positive impact on the educational development of girls and young women, just as it does for their male counterparts. For some girls of color, participation in athletics can provide the necessary impetus to complete high school and go on to college.[63] Balancing the inequality in athletics is critical to helping girls benefit from all aspects of education.

As the foregoing demonstrates, girls and women still face powerful obstacles to achieving educational equity. Because education of all young people in our society is key to the nation's ability to compete in the new global marketplace, ensuring that gender, as well as race and other immutable characteristics, are not predictors of the ability to receive a quality education, is not only the proper thing to do, it ultimately is in the best interest of the nation.

II. Clinton Administration Education Reform Initiatives

Addressing and eradicating the intransigent barriers to education for girls and young women requires an unwavering commitment to gender equity on the part of our policymakers. Such an effort calls for nothing less than an assault on the discriminatory forces that prevent girls from reaching their educational goals. In this regard, the achievement of gender equity will be the product of a systematic legislative agenda and implementation of policy directives to ensure that educational institutions throughout the country provide all students with the opportunity to learn. Although the Clinton Administration can list passage of legislation to reform the nation's educational system among its achievements, the new laws evince neither a vision of how to achieve gender equity, nor the tools to make gender equity a reality. Among the education bills signed into law this year are the reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA),[64] the School-to-Work Opportunity Act,[65] and Goals 2000.[66]

A. Reauthorization of the Elementary and Secondary Education Act

The Elementary and Secondary Education Act (ESEA) was reauthorized as part of the Improving America's School's Act. ESEA is designed to facilitate nationwide school reform by providing state and local educational agencies across the nation with funding for a variety of programs, including bilingual education, magnet schools, and violence prevention. ESEA authorizes a total of $12.7 billion in federal education funding — over half of which is designated for Title I, the program that focuses on improving educational opportunities for disadvantaged children. Interwoven throughout the Act are several provisions designed to focus the efforts of states and local school systems on achieving gender equity. In particular, ESEA provides funding for programs pursuant to the Women's Educational Equity Act, creating a Special Assistant for Gender Equity, among other provisions designed to include gender equity as part of its mandate to reform the nation's schools. Although the provisions are not as expansive as those recommended in the Citizens' Commission on Civil Rights's 1993 report, they nevertheless serve as a basis for integrating efforts to achieve gender equity into ongoing initiatives to reform the nation's schools. Moreover, of the three educational bills passed this term, ESEA contains the most provisions dealing with gender equity by far. Despite this accomplishment, serious questions arose about the Administration's commitment to achieving gender equity in education during the legislative process for the ESEA. This section provides a summary and analysis of the provisions of ESEA that promote gender equity.

1. Women's Educational Equity Act

ESEA authorizes $5 million for the Women's Educational Equity Act (WEEA) program, which enables the program to continue its work to promote compliance with Title IX. Specifically, the Act permits WEEA to continue funding research and model programs, materials, and curricula designed to advance gender equity, for example. In addition, the Act authorizes the Department of Education to work with the Office of Educational Research and Improvement to "identify[ ] research priorities related to education equity for women and girls."[67] WEEA also authorizes the Department to make grants and enter into cooperative arrangements with local groups — schools, student organizations, and community groups, for example — to engage in a number of activities designed to promote gender equity. Specifically, the Act permits the Department of Education to provide "support and technical assistance" in developing or implementing programs to address the panoply of issues affecting the ability of women and girls to obtain quality education, such as implementation of programs to provide teacher training in techniques of gender equitable instruction; school-to-work transition programs; development of tests and other assessment tools that are not biased against girls; and programs designed to facilitate the advancement of women in educational administration. In addition, WEEA authorizes research into a number of areas, including the development of sexual harassment policies; and establishment and enhancement of programs designed to increase educational opportunities for low-income women.

The continued funding of the WEEA program sends the important message that the administration is actively working toward identifying and eradicating barriers to quality education for girls and women. This message is especially significant, given the fact that the past two administrations sought to eliminate the program altogether.

2. Equity in Athletics Disclosure Act

The inclusion of the Equity in Athletics Disclosure Act[68] (EADA) is a legislative accomplishment of the Administration that sent mixed signals concerning its commitment to gender equity in education. Significantly, the EADA amends the Higher Education Act,[69] makes important findings concerning the inequalities facing women athletes in colleges and universities, and imposes data collection requirements on these institutions.

Finding that women are not given the same opportunity to enhance their education with athletics participation, the EADA requires colleges and universities to keep track of data concerning sports programming at the institutions. Specifically, pursuant to EADA, institutions will have to prepare an annual report that provides a variety of statistics, including the following: the number of male and female undergraduates; the institution's varsity teams, including the total number of players, gender of the head and assistant coaches; amount spent on athletic scholarships and other related forms of financial aid, with the ratio of such aid awarded to male and female students; and the average institutional salary for male and female coaches. The data is to be available upon request to students, potential students, and to the public. In light of the fact that, for the most part, colleges and universities have failed to provide parity for their female athletes and remain reluctant to take measures to remedy this situation, this data requirement will be extremely helpful in gauging a particular institution's progress in this regard. In addition, the data can be an especially potent weapon for the enforcement of Title IX.

Indeed, the Office of Civil Rights for the Department of Education (OCR) commented favorably on the efficacy of this legislation in the context of responding to an inquiry posed by Rep. Cardiss Collins (D-IL).[70] In fact, OCR "support[ed]" the legislation because it would assist the agency in "convey[ing] to schools, students, and parents OCR's strong commitment to gender equity in athletics."[71] In addition, the legislation "would make more readily available to OCR some of the data necessary in Title IX athletics investigations"[72] and thus would facilitate enforcement activities. Finally, OCR expected the legislation to promote voluntary compliance with Title IX "by highlighting for institutions, prospective applicants, students, and parents the frequent disparity in the benefits, services, and opportunities provided to male and female student athletes."[73] In short, OCR recognized that the EADA would provide the support necessary to enhance its enforcement of Title IX.

In marked contrast, the Secretary of Education, in separate correspondence, opposed EADA on grounds that its requirements would be too "burdensome" for colleges and institutions.[74] While noting that the Department was "committed to vigorous enforcement of Title IX," Secretary Riley stated that the information required under EADA was "simply not needed for rigorous enforcement" and that, in the event such information becomes necessary in the context of a civil rights investigation, "the Department can simply request the particular institution to supply the relevant data."[75] Thus, the Secretary was of the opinion that collection of data is superfluous to the enforcement mission of the Department and simply does not justify the placement of an undue burden on educational institutions, many of whom have already begun gathering data themselves.

The Secretary's pronouncement clearly was at odds with that of the Assistant Secretary for Civil Rights, which has serious implications for the Department's mission with respect to the issue of enforcement of Title IX, especially in the area of collegiate athletics. In this major statement concerning Title IX and gender equity, the Department stood its ground on the side of the same colleges and universities that give short shrift to athletics programs for women, in the face of the well-established fact that young women are being denied equal opportunities to pursue athletics in institutions across the country as indicated by Congress's findings. In essence, the Department, through Secretary Riley's letter, made the calculus that the convenience of an educational institution trumps the rights of young women to have the same educational opportunities as young men. While this viewpoint ultimately did not prevail, it has disturbing implications for the Department's vision concerning enforcement of Title IX overall.

3. Special Assistant for Gender Equity

In another important provision, ESEA establishes a Special Assistant for Gender Equity in the Department of Education. Because of the absence of any coherent or systematic approach to ensuring gender equity during the past, women's rights advocates proposed and lobbied for the creation of a new Office of Gender Equity, similar to other offices within the Department that are dedicated to providing support and assistance for other underserved populations, such as the Office of Bilingual Education and Minority Languages Affairs and the Office of Special Education and Rehabilitative Services. As proposed, the Office of Gender Equity would coordinate gender equity efforts in educational programs within the Department and throughout the federal government generally, in addition to providing technical assistance to educational institutions across the country.

Instead of creating an office to provide a comprehensive approach to addressing issues of gender equity, ESEA creates the lone position of Special Assistant, who is to be appointed by the Secretary of Education. The Special Assistant is charged with promoting, coordinating, and evaluating gender equity programs throughout the country and will be responsible for providing technical assistance and coordinating research activities in this important area. These responsibilities are significant, broad, and have the potential to impact upon the policies of schools across the country. However, due to the breadth of the responsibility, the Special Assistant will have to be sufficiently embraced by and integrated into the

Department, to ensure that she or he has the resources and the requisite support to conduct these activities in a manner that will be meaningful.

4. Integration of Provisions to Promote Gender Equity

In addition to providing funds for the WEEA program and establishing the new Special Assistant for Gender Equity, ESEA contains a number of provisions designed to ensure that promotion of equal education opportunities for girls and women in education is an integral part of school reform. In particular, as an initiative that primarily provides funds for schools, ESEA's approach toward gender equity essentially is to provide school systems with a monetary incentive to address the impediments to education for girls and women, as well as other traditionally underserved groups. Specifically, in order to receive funds that are available through ESEA, states have to demonstrate that their proposed plans will assist in statewide efforts to accomplish objectives consistent with ESEA, particularly addressing gender equity. For example, states seeking funds to reform their schools' programs must demonstrate that they will use instructional strategies that address the needs of girls and women, in addition to other underserved populations.

In identifying populations in need of specialized attention on the part of school systems, ESEA also seeks to promote gender equity. For example, the Even Start program, which is designed to improve literacy starting with early childhood education and continuing to adulthood, includes parenting teens among the target groups to receive services. In addition, the Act identifies pregnant and parenting teens as "at-risk" for dropping out of school and in need of programs to prevent them and other "at-risk" students from leaving school. Accordingly, local educational agencies seeking funds to implement this program must demonstrate how their schools will coordinate activities with existing social and health services, including those directed at teen parents, in order to address the needs of such students.

In providing funds for teacher training and materials to enable students to meet the educational standards embodied in this legislation as well as those articulated in Goals 2000, ESEA contains provisions designed to ensure that the needs of all students are met, particularly those that have been poorly served by the existing educational system, including girls and women. For example, to accomplish the goals of improving teaching and enhancing learning, the Act authorizes the Department of Education to fund the creation of a clearinghouse for math and science education, which would maintain and disseminate information about model programs and instructional materials, in addition to other activities. States seeking funding under this program must demonstrate that their proposed plan will address the needs of "historically underrepresented groups, including females."[76]

Recognizing that assuring children of their safety is key to enhancing their ability to learn, ESEA includes provisions designed to assist states and local educational agencies in their efforts to prevent drug abuse and violence, including sexual harassment. In defining "drug and violence prevention" the Act includes sexual harassment and abuse among the "violent and disruptive acts" targeted for eradication.[77] Local educational agencies are authorized to design and implement programs that address sexual harassment and its effects, as well as those designed to combat such misconduct.

5. Data Collection

In order to assess the progress of states and localities in accomplishing the goals of their programs, the Act requires data collection and maintenance, which is particularly important for purposes of civil rights enforcement. In the context of Title I, the Act requires local education agencies seeking grants to reform schools with a majority of low-income students to modify their existing programs to facilitate the collection of data "desegregated by gender, race, ethnicity,"[78] among other characteristics. Such a requirement will permit the local agency, as well as advocacy groups and enforcement agencies to track the progress groups that have been discriminated against on the basis of multiple characteristics, such as Latina girls or disabled children of color, for example. The Act also requires the Department of Education to conduct an ongoing evaluation of Title I programs in which the data should be "collect[ed], crosstabulate[d], and report[ed] by sex within race or ethnicity and socioeconomic status,"[79] whenever possible. Similar data collection provisions exist with regard to the Women's Educational Equity Act.[80] Providing for crosstabulation of data is crucial to enable educators and advocates to determine the particular problems facing girls and women of color.

6. An Attempt to Waive Civil Rights Laws — The Danforth Amendment

The process of reauthorizing the ESEA was marked by debate concerning single sex education as a means of addressing the needs of inner-city children. Specifically, Senator John Danforth (R - Missouri) offered an amendment to the Senate version of the bill that would have waived Title IX, as well as other important civil rights laws, to allow school systems to provide single sex classes on an experimental basis. This amendment was intended to address some of the ills preventing economically disadvantaged children, primarily African American or Latino, from attaining a quality education; however, it sought to do so in a manner that would have jeopardized the civil rights laws that protect the classes sought to be assisted by this action.

It is well established that urban school systems are failing to provide their students, the vast majority of whom are persons of color, with the education they need. Brutally underfunded, these schools typically are warehouses for children, characterized by substandard facilities, as in East St. Louis, Illinois, where the flow of sewage in one school resulted in repeated closings;[81] inadequate resources, as in Chicago, Illinois, where books in another school "sprouted mold" because there was no library in which to shelve them;[82] insufficient space for students, as in the Crown Heights section of Brooklyn, New York, where closets and bathrooms have been converted into classrooms;[83] and indifferent instructors, as in one northern California school, where teachers call students "animals," "stupid," or "bitch."[84] In this environment, the most powerful and enduring message for children of color is that they have no value. Boys and girls get these messages equally. Creation of single sex classrooms, while having a surface appeal as a way to focus attention on children that have been neglected by the educational system, would not address the systemic problems that deny them of education.

Moreover, as proposed, the Danforth amendment would have violated the Equal Protection clause of the 14th Amendment and created more problems with regard to the civil rights laws designed to assist the very students sought to be protected. Title IX permits a variety of separate gender programs[85] and allows single sex programming where it is designed to remedy past discrimination.[86] Thus, the proposed amendment would have placed in jeopardy existing lawful programs by creating the erroneous inference that such programs violated the law. The proposed amendment also would have created a troubling precedent by suggesting that hard-fought civil rights protections could be waived in the interest of experimentation, an unsavory notion. In sum, creation of single sex classes presented a deeply flawed "band-aid" solution to a complex problem — "single-sex academies" are no substitute for equitable and adequate funding, for example.

The Clinton Administration was silent during this debate, when it could have provided its view about the impact the proposed amendment would have on its civil rights enforcement efforts. It appears that in the politically charged environment in which the amendment was offered, the Administration was unwilling to oppose a measure designed to help inner-city children, even though this measure would have had a broader negative impact on civil rights laws in general. Once again, even though this effort was soundly defeated, the Administration's silence sends a troubling message. Namely, it suggests the absence of an overall vision for the manner in which civil rights enforcement should be carried out. In the absence of such a vision and an attendant programmatic strategy to carry out that vision, the

Administration lost the opportunity to expose the real problems in the educational system, and to promote its own efforts to address them by providing funding for innovative educational programs targeted at disadvantaged students through ESEA, which signifies meaningful relief for young African Americans, rather than the illusory remedy represented by the Danforth amendment. Moreover, the Administration lost an opportunity to demonstrate its commitment to civil rights in order to combat the false notion that such laws are an impediment to equal opportunity, a sentiment that was inherent in the Danforth amendment.

B. School-to-Work Opportunities Act of 1994

The School-to-Work Opportunities Act of 1994 provides a national framework for postsecondary job training programs, designed to facilitate a smooth transition from school to work for all students, particularly those who have had limited opportunities under the existing system. At its core, School-to-Work is intended to offer non-college-bound high school students the academic and vocational skills necessary to succeed in today's workforce. Because School-to-Work only establishes the national framework that coordinates and funds state participation, implementing these goals can be accomplished only through the voluntary cooperation of state and local governments.

School-to-Work requires that "all students" receive "equal access" to all programs offered pursuant to its provisions. Significantly, the Act defines "all students" in part as: "both male and female students from a broad range of backgrounds and circumstances."[87] By expansively defining the universe of students to be served by School-to-Work programs, the Act seeks to send the message that the full scope of programs should be available to students, irrespective of their gender, race, ethnicity, socioeconomic status, among other characteristics, even though the Act itself does not impose any requirements to ensure that tracking of students on these bases does not occur.

State programs generally must offer students an opportunity to complete a career major, which the Act defines as a coherent sequence of courses or fields of study that meets certain criteria designed to accomplish the legislative goal of providing students with the vocational and academic skills to prepare them for meaningful employment. State programs must also include school-based and work-based learning components, and coordinate recruitment, enrollment, and placement activities. The vocational policy mandate of School-to-Work requires that these career majors offer participants experience and understanding in all aspects of the particular career students are preparing to enter (including planning, management, financial support, technical and production skills, and labor and community issues). School-to-Work's emphasis on integrating in-class instruction and occupational skills is intended to reduce the likelihood that state programs will serve as dumping grounds for students with low academic achievement or, conversely, as elite-only training opportunities, which likely would have a greater impact on disadvantaged students. The Act authorizes $300 million for the development and implementation of state and local School-to-Work programs, which is intended to cover the initial costs of planning and establishing all state programs. Once state plans are developed, however, the federal funding allocated for implementing these plans is available on a competitive basis.

States seeking funding to develop and implement School-to-Work plans must make several showings that the proposed program will promote gender equity. For example, all applications seeking federal funding pursuant to School-to-Work must include a description of how the Governor, the Sex Equity Administrator, and state agencies for education, economic development, employment, vocational education, among others, will collaborate in the planning and development of the state program.[88] It is important to note, however, that the Gender Equity Administrator's participation in the development of the state School-to-Work program is not required; the Administrator need only offer comment on the state program, which may or may not be incorporated into the final program. School-to-

Work also requires the Secretaries of Education and Labor to work with the parties developing and implementing the state programs (including the Sex Equity Administrator) on a continual basis to ensure effective administration of School-to-Work programs. In this regard, School-to-Work provides a check on state programs to ensure that issues of gender equity are considered in the process of developing and implementing School-to-Work programs.

School-to-Work also attempts to expand opportunities in nontraditional fields for women and people of color. Specifically, provisions covering career guidance, counseling, and exploration require state programs to emphasize the availability of occupational careers traditionally not pursued by the student's racial, ethnic, or gender group. With regard to women, who historically have been tracked into low-tech, low-paying fields such as home economics, states also must outline their strategies for ensuring that women have access to opportunities that lead to employment in high-performance, high-paying jobs. In addition, states seeking funding must outline a set of goals for ensuring that young women can pursue these nontraditional careers in environments free from racial and sexual harassment, an important requirement in light of the fact that severe harassment in male-dominated fields, such as construction, serves as a powerful disincentive for women's entry into such areas.

In addition to the required gender equity provisions noted above, School-to-Work allows state programs to provide a variety of supplementary services designed to promote access to female students participating in School-to-Work programs. For example, state programs may provide child care and transportation to School-to-Work sites in instances where such services are necessary for participation in the program. States also may design curricula that reflect the diverse learning needs and abilities of the student population served by the state program. States also may diversify the pool of participants by developing recruitment and retention strategies with community-based organizations for all students in School-to-Work programs.

Provisions for assessing the progress that state programs make toward achieving the academic and vocational aspirations of School-to-Work include an examination of the program's treatment of underserved students. Under Title I, all participating states must collect and analyze data regarding the outcomes of program participants on the basis of socioeconomic status, race, gender, ethnicity, culture, and disability among other characteristics. Maintenance of such data will be helpful in the effort to ensure that problems such as sex segregation are not perpetuated under the new job training network created by the Act. In addition, states seeking funding must work with the Education and Labor Departments to establish a system of performance measures to assess such programs, examining such factors as: (1) the extent to which employers, schools, students, and school dropouts participated in School-to-Work programs; (2) the program's success in developing and implementing strategies for addressing the needs of school dropouts; (3) the program's progress in achieving the state's goals for ensuring that young women had opportunities to participate in School-to-Work programs, including those programs leading to nontraditional employment; and (4) outcomes for participating students and school dropouts by gender, race, ethnicity, socioeconomic background, limited English proficiency, and disability of the participants, and whether the participants are academically talented students. Although the Act directs the Labor and Education Departments to use these factors to evaluate the progress and effectiveness of the state programs, it provides no indication of what penalty, if any, will be imposed if states fail to advance in these areas.

C. Goals 2000: Educate America Act

Goals 2000 sets forth eight national educational goals to be achieved by the year 2000, including the following: school readiness; math and science achievement; adult literacy; teacher education and professional development; and safe, disciplined, and alcohol- and drug-free schools. Goals 2000, like School-to-Work, does not require states to adopt and achieve these goals; rather, states are encouraged to participate voluntarily in achieving this endeavor. Just as School-to-Work, Goals 2000 provides for the coordination and funding of the development and implementation of state programs that facilitate the achievement of the national education goals.

Federal grants are awarded on a competitive basis to states that demonstrate that they will develop and implement a plan for reforming their elementary and secondary education systems consistent with the national education goals. To obtain funding during the first year of the implementation of Goals 2000, each state must describe its strategy for meeting the national educational goals, establish state panels to draft a school reform plan, and establish content, performance, and opportunity to learn standards. The requirements for obtaining federal funding during subsequent years are more rigorous. State improvement plans must identify and facilitate the policy changes necessary to help students reach the national educational goals. State plans must also include strategies for providing all students with an opportunity to learn the skills and obtain the knowledge set forth in the national and state content and performance standards, address drop-out prevention strategies, and describe how a School-to-Work program will be incorporated into the school reform efforts.

Goals 2000 attempts to affect gender equity in educational institutions with a host of provisions. One of the objectives for achieving safe, disciplined, and alcohol- and drug-free schools is that every school works toward eliminating the problem of sexual harassment.[89] Goals 2000 also provides that gender equity be considered in the process for certifying state "opportunity to learn" standards, which are designed to facilitate all students' capacity to learn the information articulated in the national content standards. In addition, Goals 2000 provides that a state's strategy for meeting the national educational goals, as set forth in the improvement plan, may include "a process for developing, selecting, or recommending instructional materials, including gender equitable and multicultural materials, and technology" or by providing training in gender equitable teaching methods for teachers, administrators, and others to attain the goals of the legislation.[90]

Goals 2000 also provides a framework for developing a national system of skill standards that embody principles of nondiscrimination that may be used in the process of assessing and certifying state programs' vocational skill achievement.[91] The national skills standard may include components that prohibit discrimination on the basis of race, color, gender, age, as well as religion, and are "consistent with federal civil rights laws."[92] Alternatively, a national skills standard may include a system to assess state program participants' attainment of skills that includes methods for ensuring that such systems are not discriminatory with regard to race, gender, age, ethnicity, disability, or national origin.

Goals 2000 also provides for the creation of research institutes that will address gender equity issues, among others, to facilitate the attainment of the national objectives. For example, the National Institute of Student Achievement is charged with: conducting research that, among other things, narrows the gender gap favoring males in science and females in writing; developing programs, policies, and approaches that promote gender equity in elementary and secondary education; and identifying, developing, and implementing programs designed to enhance academic achievement and narrow racial and gender performance gaps in a variety of subject matter areas. The National Institute on the Education of At-Risk Students is authorized to conduct research aimed at benefiting "at-risk" students, which includes developing programs designed to promote gender equity in schools. The National Institute on Educational Governance, Finance, Policy-Making and Management must undertake research necessary to provide a sound basis from which to identify, develop, and evaluate approaches in elementary and secondary school governance, finance, policy-making and management at the state and local level that promote educational equity — including policies that increase the number of women and minorities among leadership and management positions in education.

III. Civil Rights Enforcement

The election of President Clinton portended a resuscitation of civil rights enforcement, following twelve long years of indifference and outright hostility to notions such as affirmative action and gender equity. The new administration faced the daunting task of reversing policies inimical to the nation's civil rights laws and reinvigorating agencies whose mission had been transmogrified into the evisceration, rather than the enforcement of, those laws. Nowhere was this mission more necessary than at the Department of Education's Office of Civil Rights (OCR), which is charged with enforcing Title IX of the Education Amendments of 1972, among other civil rights statutes.

Consistent with the mandates of the Reagan–Bush Administrations, OCR was programmed to reverse important civil rights advances during that era. For example, like other civil rights agencies, OCR's resources were cut dramatically in the past twelve years. In 1980, at the end of the Carter Administration, the agency had 1,200 full-time positions; by the end of the Bush Administration, that number had dropped to 838, a decrease of 30%. OCR used those limited resources to the detriment of women and people of color seeking equal opportunity in education. From the attack on minority scholarships originating from former Assistant Secretary Williams, to the failure to institute enforcement proceedings in even one Title IX case, OCR was a barrier to equal opportunity in education. With the arrival of the Clinton Administration came a sense that OCR would rededicate itself to its proper mission and get back into the business of enforcing the civil rights laws, particularly Title IX. The record here is mixed, however.

The Assistant Secretary for Civil Rights at the Department of Education was one of the first Clinton appointees charged with enforcing civil rights laws to take office, joining OCR in May of 1993. Upon taking the helm of the agency, the Assistant Secretary undertook the strategic planning that would be necessary for effective enforcement.[93] Signalling a change from the past twelve years, the Assistant Secretary articulated a mission for the agency: "to ensure equal access to education and promote educational excellence throughout the nation through vigorous enforcement of civil rights."[94]

The initial phase of implementing this mission consisted largely of OCR meetings with "focus groups," comprised of parties concerned about enhanced enforcement of the civil rights laws, which included representatives from the civil rights community and educators, among others, to formulate a plan and set priorities for the agency. The overarching goal of this agenda was to reach all the protected classes served by OCR through "proactive" measures. The strategic plan developed from this process set forth several "Priority Areas," the first of which is "equal access to high quality, high standards education," to which 80% of the agency's resources are to be dedicated. In this connection, emphasis is to be placed on the following areas: admissions/testing; overrepresentation of minorities in special education; underrepresentation of women, girls, and minorities in math, science, and talented and gifted programs; and access to programs for limited English proficient students. The remaining 20% of the agency's resources is to be divided among the following: racial and sexual harassment (10%), gender equity in athletics (5%), and higher education desegregation (5%).[95] Overall, OCR staff has been directed to dedicate 40% of their time pursuing these priority areas proactively; the remaining 60% is to spent on handling complaints.

In order to facilitate the agency's new emphasis on aggressive enforcement, OCR developed and implemented a new complaint resolution process, designed to eliminate a layer of review, permit a more timely response to complaints, and, in turn, obtain earlier resolutions.[96] Pursuant to the new process, investigators are no longer required to write an investigative report at the resolution of complaints. Such reports were required even if the agency found no violation of civil rights laws. This change reflected the new Administration's belief that focusing resources on battling evident discrimination was preferable to issuing findings where no discrimination existed.[97] Although the overall impact of this change on OCR's enforcement cannot be ascertained yet, it should be noted that the new policy is not without problems. Under the new process, investigators are directed to determine what the parties want; however, this direction has resulted in some complaining parties feeling pressured to resolve their complaints. In addition, because the case resolution letters coming out of the new process do not provide a great deal of detail, they also provide little to eliminate OCR's rationale for finding that a violation did not exist.

In shifting away from being a complaint-driven agency, OCR also undertook other activities designed to increase the visibility of the agency and, presumably, encourage compliance by recipients. Among the activities the agency considers as evidence of this new focus are increased participation in conferences by OCR staff, "aggressive technical assistance" to which advocates and recipient groups are invited and encouraged to attend, and conducting compliance reviews and issuing policy guidances.[98]

One of the first actions that appeared to set the tone for the agency was OCR's issuance of an important policy guidance concerning minority scholarships[99] that reaffirmed the agency's commitment to the use of race-targeted scholarships. This action sent a message concerning the agency's transformed attitude toward civil rights. In particular, the policy guidance set forth the conditions under which public and private institutions could continue using scholarships as a means of recruiting students of color, going so far as to "encourage" the use of these resources to diversify campuses. The policy clearly stated that providing such financial assistance could be accomplished within the parameters of existing case law.[100] In sum, this policy served two very important goals: informing advocates, recipients, and students that OCR's mission was now to promote civil rights, and that it would use its tools to ensure that the true intent of applicable civil rights laws would be implemented. Other attempts to issue policy have not been as successful, unfortunately.

In March 1994, OCR issued an "investigative guidance" on racial harassment[101] that raised more questions than it answered. Unlike the policy guidance on minority scholarships, this guidance was not issued for notice and comment. As a result, the civil rights community, as well as recipients and other interested communities, were denied the opportunity to inform the process with their experiences, insights, and concerns. The resulting guidance directs investigators to use a flawed analysis in determining whether a violation of Title VI has occurred — specifically directing investigators to use the burden-shifting analysis of *McDonnell Douglas*, which is inappropriate in the context of harassment. In addition, the policy provides no guidance about addressing potential conflicts with the First Amendment. OCR has been urged to revisit and revise this policy to ensure that investigators and recipients fully understand the nature of the obligations required by Title VI.

With regard to gender equity, the Administration is moving away from the enforcement strategy articulated in the past, which focused primarily on athletics and pregnancy, and moving toward examining a wider array of issues, such as underrepresentation of girls in high track courses, biases in testing, and sexual harassment. In targeting these issues, the majority of OCR's activity is occurring in the context of compliance reviews and policy guidance.

For example, OCR presently is in the process of developing its policy guidance on sexual harassment. As a result of the controversy engendered by the racial harassment guidance, the agency has modified the process significantly. Specifically, the agency has discussed various iterations of the policy with "focus groups" consisting of civil rights advocates, recipient groups, and educators. In addition, OCR has indicated that the proposed policy will be published for notice and comment, thus providing interested parties with an opportunity to provide the agency with additional information and analysis of the issues at hand. It is our hope and belief that the resulting policy will be grounded in sound legal principles that will provide educational institutions of a clear understanding of their obligations under Title IX and curb this form of discrimination.

OCR also is in the process of ascertaining methods of ensuring that testing improves access to education for girls and women instead of limiting opportunities, as has been the case for too long. The Assistant Secretary has stated that the agency was seeking guidance from educators about updating the agency's testing policy. OCR should use the information gathered in this process to issue a policy guidance on nondiscriminatory testing methods. OCR also is in the process of negotiating a case filed by FairTest and the American Civil Liberties Union concerning gender bias in the PSAT.

In collegiate athletics, OCR is in the process of updating its investigator's manual. As with the other substantive areas, the agency is conducting focus groups with women's groups and educators to determine what changes need to be made to the manual. In addition, at the time this chapter was drafted, OCR was in the process of conducting a compliance review at a community college regarding girls' participation in high track courses. Technical assistance was also identified as a means of addressing this issue. Stronger enforcement, particularly use of the defunding process, is necessary to ensure that girls and young women are provided equal access to athletic opportunities.

OCR is obligated to conciliate its cases to achieve compliance before using the enforcement tools it has at hand. Among those tools is the withdrawal of federal funds, as indicated above which the agency has yet to use in the context of Title IX. OCR also has the authority to refer cases to the Department of Justice for enforcement purposes. To date no case involving sex discrimination has been referred to Justice.

By identifying several issues that are particularly problematic for girls and young women, OCR has taken the first steps toward articulating its vision with regard to enforcing the gender equity mandate of Title IX. However, in the absence of strong proactive measures undertaken systematically, this vision will remain merely a pronouncement contained within its strategic plan. A systematic approach to enforcement of Title IX only becomes more important in light of the new funds available through ESEA, School-to-Work and Goals 2000. In this connection, OCR should devise and implement a plan for vigorous enforcement of Title IX, making use of all the enforcement tools OCR has at its disposal. In formulating such a plan, OCR should resolve to take the following actions:

- Expedite the process for promulgating the sexual harassment policy guidance to inform students about their rights and schools about their responsibilities. Doing so will go a long way toward facilitating the identification and eradication of this form of harassment.
- Institute enforcement proceedings where necessary, either through the defunding process available to OCR or by referring matters to the Department of Justice. The specter of both these actions would send a powerful message concerning the Administration's commitment to eradicating sex discrimination in education. OCR should demonstrate decisively that it will take action against recipients that violate the law and not settle for agreements that resolve cases by permitting them to merely implement policies without remedying the harm suffered by students. In addition, as was recommended in the Citizens' Commission on Civil Rights's 1993 Report, OCR and the Department of Justice should develop strategies to incorporate *Franklin v. Gwinnett County*[102] in their enforcement activities. *Franklin* provides for monetary damages as a remedy in cases of intentional discrimination under Title IX, as well as the other federal funding statutes, Title VI, Section 504, and the Age Discrimination Act.
- Improve its communication with advocates, recipients, educators, and others interested in OCR's activities. At present, the only way to determine the actions taken in particular case, is

to file a FOIA request, which is a very lengthy and cumbersome process. There is enforcement value in providing the public with access to the decisions OCR makes — recipients can learn what is expected of them under the law; students can learn what their rights are. Other enforcement agencies provide this information on a regular basis. OCR should do the same.

Employing a systematic approach to address the issues the agency correctly has identified is key to moving OCR from a complaint-driven agency to the aggressive enforcement entity that it seeks to become.

IV. Conclusion

The Clinton Administration has taken some important steps toward addressing the issues that keep gender equity in education out of reach for so many girls and women. However, passage of important legislation and identification of issues will do nothing to impact the lives of girls and young women, whose opportunities continue to be circumscribed by sexism, without a vision of how to achieve a nondiscriminatory educational system and an unwavering commitment to make that vision a reality. Without both, girls and young women will continue to be marginalized in education to their detriment, and to the detriment of this nation.

Endnotes

[1] Peggy Orenstein, *Schoolgirls: Young Women, Self-Esteem, and the Confidence Gap*, xv (1994) (hereinafter Schoolgirls).

[2] *Id.* at 402.

[3] *Id.* at 208.

[4] National Center for Education Statistics DIGEST OF EDUCATION STATISTICS, 128 (U.S. Department of Education, Office of Education Research and Improvement, 1994 (hereinafter *Education Digest*).

[5] EDUCATIONAL DIGEST, 250 - 256, 406.

[6] *Schoolgirls*, p. 64.

[7] American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, 7 (1993) (hereinafter *Hostile Hallways*).

[8] *Id.* at 15.

[9] Nan Stein, Nancy Marshall, and Linda Tropp, *Secrets in Public: Sexual Harassment in Our Schools*, 2 (NOW Legal Defense and Education Fund and Wellesley College Center for Women, 1993 (hereinafter *Secrets in Public*).

[10] *Hostile Hallways* at 22.

[11] *Secrets in Public*, 2.

[12] *Id.* at 26.

[13] Seventy-seven percent of girls told a friend about being harassed; only 14% told a teacher. *Hostile Hallways* at 14.

[14] "Do College-Bound Girls Face a Disadvantage When They Sit Down to Take the SAT Test?" 4 *CQ Researcher* 488, 489 (1994) (hereinafter *CQ Researcher*).

[15] *Id.*, at 489, citing Phyllis Rosser, "The SAT Gender Gap: Identifying the Causes," Center for Women Policy Studies (1989), p. 52.

[16] American Association of University Women, *How Schools Shortchange Girls: A Study of Major Findings on Girls and Education*, 54 (AAUW Educational Foundation and the Wellesley College Center for Research on Women, 1992) (hereinafter *How Schools Shortchange Girls*).

[17] House Committee on Ways and Means, *Overview of Entitlement Programs: 1994 Green Book; Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means*, 1141 (1994).

[18] Katherine Connor and Ellen Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 BERKELEY WOMEN'S L. J. 13, 15 (1992).

[19] *Id.*

[20] *Id.*

[21] *See id.* at 25 n. 59.

[22] *Id.* at 26.

[23] *CQ Researcher* at 488.

[24] *Schoolgirls*, at 19.

[25] *Schoolgirls*, at 18.

[26] *See How Schools Shortchange Girls*, at 24, 26.

[27] *Id.*

[28] *Id.* at 26.

[29] *Id.*

[30] *Id.* at 27.

[31] Beatriz Chu Clewell and Bernice Anderson, *Women of Color in Mathematics, Science, and Engineering: A Review of the Literature*, 5 (Center for Women's Policy Studies, 1991).

[32] *Id.*

[33] *Id.* at 5.

[34] *Id.* at 9.

[35] *Id.* at 11.

[36] *Id.* at 7.

[37] *Id.* at 8.

[38] *Id.* at 8.

[39] *Schoolgirls*, at 23.

[40] Margaret Dunkle, *Adolescent Pregnancy and Parenting: Evaluating School Policies and Programs from a Sex Equity Perspective*, 1 (1985).

[41] *Id.* at 16.

[42] *But see Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d 779 (3rd Cir. 1990), *pet. for reh'g denied* 1990 U.S. App. Lexis 23289, (upholding exclusion of pregnant girl from National Honor Society based on the fact that she had engaged in premarital sex).

[43] The Alan Guttmacher Institute, *Sex and America's Teenagers*, 61 (1994).

[44] *Id.* at 41.

[45] *Id.* at 42.

[46] *Id.* at 63.

[47] *Id.*

[48] Donna Milgram and Kristin Watkins, *Ensuring Quality School-to-Work Opportunities for Young Women*, 5 (Wider Opportunities for Women, 1994)(hereinafter *Ensuring School-to-Work Opportunities*).

[49] *How Schools Shortchange Girls*, at 42.

[50] *Id.* at 43.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Suzanne Silverman, Alice Pritchard, *Building Their Future: Girls in Technology Education in Connecticut*, 5 (Vocational Equity Research, Training and Evaluation Center, 1993).

[55] *Id* at 2.

[56] *Ensuring School-to-Work Opportunities*, at 1.

[57] *Title IX: The Half Full, Half Empty Glass*, 46 (National Advisory Council on Women's Educational Programs, 1981).

[58] *How School Shortchange Girls*, at 45.

[59] *Id.*

[60] *Id.*

[61] Donna Lopiano, *Will Gender Equity Kill the Golden Goose of College Football?* 1 (1992).

[62] *More Hurdles to Clear: Women and Girls in Competitive Athletics*, 2 (U.S. Commission on Civil Rights, 1980).

[63] *How Schools Shortchange Girls*, at 45.

[64] Pub. L. No. 103-382.

[65] Pub. L. No. 103-227.

[66] Pub. L. No. 103-227.

[67] Sec. 5202(a)(4).

[68] Title III, Section 360B.

[69] 20 U.S.C. § 1087a *et seq.*

[70] April 7, 1994, letter to Honorable Cardiss Collins from Assistant Secretary Norma Cantú (hereinafter referred to as "Cantú letter).

[71] *Id.* at 2.

[72] *Id.*

[73] *Id.*

[74] September 13, 1994, letter to Honorable Edward M. Kennedy from Secretary Richard Riley (hereinafter referred to as "Riley letter").

[75] *Id*. at 2.

[76] Sec. 2205(b)(2).

[77] Sec. 4131.

[78] *Id.*, Sec. 1114(b)(2)(A)(v).

[79] Sec. 1501(c)(1)(E). *See also* Sec. 5307(a), which requires the Secretary to submit an annual progress report to Congress concerning the implementation of a definition and data collection process for monitoring school drop outs.

[80] Sec. 5404(b)(2).

[81] Jonathan Kozol, *Savage Inequalities: Children in America's Schools*, 23 (1991).

[82] *Id*. at 53.

[83] *Id.* at 114.

[84] *Schoolgirls*, at 141, 143, 153.

[85] *See* 34 C.F.R. § 106.3.

[86] *See, e.g., Mississippi University for Women v. Hogan*, 102 S.Ct. 3331, 3338 (1982).

[87] Sec. 4(2).

[88] Sec. 203(b); sect. 213(b). The responsibilities and authority of the Gender Equity Administrator are adopted as set forth in the Carl D. Perkins Vocational and Applied Technology Education Act without modification. *See* 20 U.S.C. 2321(b)(1).

[89] Sec. 102(7)(B)(vii).

[90] Sec. 306(c)(2)(C, D).

[91] Sec. 502.

[92] Sec. 504(d)(1)(B)(i)(VII), (ii)(III).

[93] Nov. 10, 1994, interview with Assistant Secretary Cantú. (hereinafter referred to as "Cantú interview")(Notes on file with the National Women's Law Center).

[94] OCR Strategic Plan Memorandum, October 14, 1993 at 2.

[95] *Id.*

[96] Cantú interview.

[97] Cantú interview.

[98] *Id.*

[99] F.R. 8,756 (1994).

[100] *But see Podberesky v. Kirwan*, No. 93-2527 (4th Cir., October 27, 1994)(invalidating the University of Maryland's use of race-conscious scholarships).

[101] Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 F.R. 11,448 (1994).

[102] 112 S.Ct. 1028 (1992).

Chapter XII

Equal Employment Opportunity

by Helen Norton

Through its role in enforcing federal employment law and shaping legislative policy, the Clinton Administration has the power and the responsibility to ensure the civil rights of all working Americans. In the 1993 edition of *New Opportunities*, we urged the incoming Administration to generate — and act upon — an aggressive agenda for expanding equal employment opportunity.

Two years later, the Clinton Administration's record in this area is mixed. With the recent confirmation of a full complement of commissioners at the Equal Employment Opportunity Commission (EEOC), each of the three key enforcement agencies finally has in place committed leadership with expertise in civil rights enforcement. Indeed, we have seen a number of promising developments, as the Department of Justice reversed its role from longstanding civil rights saboteur to civil rights supporter, and the Office of Federal Contract Compliance Programs developed a model enforcement agenda. On the other hand, the EEOC's enforcement performance remains dismal, and the Department of Justice has only just begun to develop an affirmative agenda on employment issues.

This chapter examines the Clinton Administration's successes and failures to date in this critical area.

I. Legislative Opportunities

A. Accomplishments

Although the 103rd Congress proved disappointing in many ways, some key initiatives for expanding equal employment opportunity were enacted with the strong support of the Clinton Administration. They include:

- *The Family and Medical Leave Act* (FMLA). By providing job security to workers who need up to 12 weeks of leave to care for a newborn or newly adopted child or a seriously ill family member, the FMLA ensures that workers faced with family or medical emergencies are not forced to choose between their families and their jobs. President Clinton made the FMLA's protections for working families a top priority, signing the bill into law just days after his inauguration and thus ending the nine-year struggle over its enactment.
- *Expansion of the "rape shield rule" to all federal civil and criminal cases.* The Violence Against Women Act (ultimately enacted as part of the Violent Crime Control Act) included an amendment to the Federal Rules of Evidence that expands the "rape shield rule" to cover all federal cases, both civil and criminal. This rule, which had previously extended only to federal criminal sexual assault cases, now generally bars the admission of evidence of the alleged victim's prior sexual behavior in all federal criminal and civil cases, including sexual harassment cases. This helps ensure that the focus at trial remains on the defendant's alleged conduct, not on the victim's private life. Extending the rape shield rule to civil

cases also helps ensure that victims of sexual harassment and other forms of discrimination will not have to endure irrelevant and potentially humiliating queries about their private lives.

B. Recommendations for Legislative Action

The Clinton Administration should move forward an affirmative employment agenda by developing, promoting, and signing into law key legislative initiatives. Enactment of these measures would ensure and expand equal employment opportunity for all. They include:

- *the Equal Remedies Act*, which would ensure that victims of sexual harassment and other forms of intentional discrimination on the basis of sex, religion, or disability receive full compensation for their injuries. The Civil Rights Act of 1991 currently places arbitrary caps on the amount of damages victims of such discrimination may recover, no matter how large their financial loss or how great their anguish.
- *the Civil Rights Procedures Protection Act,* which would prohibit employers from requiring workers to sign away their right to bring discrimination claims in court — a practice increasingly commonplace in the aftermath of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[1]
- *the Sexual Harassment Prevention Act*, which would require employers to post notice of workers' right to be free of sexual harassment. The Act would also require employers to provide regular information to supervisors and workers about their rights and responsibilities with respect to sexual harassment.
- *the Fair Pay Act*, which would prohibit pay disparities based on gender, race, or national origin between jobs that are equivalent in terms of required skill, effort, responsibility, and working conditions.
- *the Federal Employees Fairness Act*, which would reform the current conflict-ridden system for resolving discrimination complaints by federal workers.
- *the Justice for Wards Cove Workers Act,* designed to eliminate the loophole created by the Civil Rights Act of 1991 that exempts Wards Cove cannery workers from the Act's protections.
- *the Employment Non-Discrimination Act,* which would prohibit job discrimination on the basis of sexual orientation.

In addition, ***the Clinton Administration and Congress should recognize that sufficient funding is key to the enforcement agencies' success, and should support agency enforcement efforts with increased funding.*** They should ensure that the EEOC and other agencies charged with civil rights enforcement receive sufficient appropriations to enable them to enforce anti-discrimination laws effectively. For example, each and every component of the EEOC — the Commissioners, the Office of General Counsel, the Office of Legal Counsel, the Office of Program Operations, and other programs — is inadequately funded given the agency's wide-ranging and critically important mandate. As just one example, the EEOC's salary structure ranks at the bottom of all investigative agencies, making it very difficult to attract and retain talented personnel.

Last year Congress scuttled President Clinton's request for additional funding for the EEOC as part of his economic stimulus program. This year, House and Senate conferees unexpectedly and without explanation reduced the EEOC's appropriation to less than the amount that had earlier been approved by each body.[2] Thus, current EEOC funding is $13 million less than that requested by the Clinton Administration, and only $3 million more than the FY 1994 appropriation — a *decline* in real dollars. Similarly, the OFCCP currently has the equivalent of only 800 full-time employees (FTEs), down from its 1978 high of 1800 FTEs. Without question, shrinking resources undermine the agencies' ability to fulfill their mission.

II. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964 as amended, the Equal Pay Act, the Age Discrimination in Employment Act, section 501 of the Rehabilitation Act, and the Americans with Disabilities Act. In addition, under Executive Order 12067, the EEOC is charged with providing leadership and coordination among the federal agencies involved in equal employment opportunity issues.

Thirty years after the enactment of the Civil Rights Act of 1964 and the creation of the EEOC, job bias remains a formidable problem. How the EEOC interprets and enforces anti-discrimination laws thus directly determines whether those guarantees have any meaningful effect on the economic security of American workers and their families.

The EEOC's track record during the Reagan and Bush Administrations demonstrates how the failure to enforce civil rights protections directly affects workers' lives. Throughout the 1980s and into the 1990s, the EEOC's enforcement efforts plunged dramatically under Chairs Clarence Thomas and Evan Kemp. Compared to its Carter-era enforcement record under then-Chair Eleanor Holmes Norton, the agency conducted far fewer investigations, settled far fewer cases, drastically reduced its investment in class action litigation designed to eradicate systemic discrimination, and conducted virtually no Equal Pay Act litigation.

The EEOC's performance during the 1980s meant, for example, that *fewer* workers found relief from sexual and racial harassment, pay inequities based on gender, race, and national origin, and bias-infected decisions in hiring and promotions. *More* illegal employment practices went uncensored, unremedied, and undeterred.

The inauguration of a new Administration brought with it the promise of change in civil rights enforcement. However, the EEOC's new leaders — Chair Gilbert Casellas, Vice-Chair Paul Igasaki, and Commissioner Paul Steven Miller — were not confirmed until September 1994; a General Counsel has yet to be named. Filling these positions is of great importance in setting policy, directing agency staff, and reviving the agency's commitment to enforcement. During this gap in leadership, the EEOC made several positive changes in its approach to civil rights policy, but the agency's performance in actually enforcing the law on behalf of discrimination victims remains bleak.

A. Policy Developments

As the lead agency charged with enforcing federal laws banning on-the-job discrimination, the EEOC should develop policy that interprets these laws expansively to accomplish their remedial purposes. The last two years have brought some significant improvements in the EEOC's interpretation of the laws it enforces. Even though the agency's efforts to implement such improvements have at times been stymied by the Supreme Court and Congress, they signal a welcome change in philosophy.

- *Retroactivity of the Civil Rights Act of 1991*. In April 1993, the EEOC suggested a new-found commitment to the enforcement of the Civil Rights Act of 1991 by reversing the Bush Administration's position against retroactive application of the Act's protections for victims of job bias. The Clinton Administration also joined the civil rights community in advocating retroactive application in two cases that came before the Supreme Court in 1993, *Landgraf v. USI Film Products* and *Rivers v. Roadway Express*. The Administration argued that sections 101 and 102 of the Civil Rights Act of 1991 should generally apply to discriminatory conduct that occurred prior to the date of enactment. The Court, however, ruled against retroactive application of the Act.
- *New guidelines on harassment in the workplace*. In the fall of 1993, the EEOC proposed new guidelines on forms of illegal workplace harassment other than sexual harassment (guidelines for which already exist), i.e.,

harassment on the basis of race, gender, age, color, national origin, religion, age and disability. These guidelines helpfully reiterated and emphasized that harassment on any of the bases covered by the federal anti-discrimination laws is unlawful. Many employers responded by updating their harassment policies to reflect the full reach of anti-discrimination law. However, conservatives distorted the guidelines' scope in a successful public relations campaign — claiming inaccurately that protections against religious harassment meant that workers could not wear crosses or yarmulkes in the workplace. Congress responded by voting to deny appropriations for the enforcement of the religious harassment guidelines, and the Commission voted in September 1994 to withdraw the new guidelines altogether.

- *Enforcement Guidance.* In 1993 and 1994, the EEOC's Office of Legal Counsel issued several valuable internal enforcement guidances (instructions for enforcement staff) on the application the Civil Rights Act of 1991 to seniority systems, to U.S. workers employed by American employers overseas, and to foreign employers doing business in the U.S. The EEOC also issued solid enforcement guidance on the Supreme Court's rulings in *St. Mary's Honor Center v. Hicks* and *Harris v. Forklift Systems*.

On the other hand, in 1993 the Commissioners proposed to eliminate the EEO6 recordkeeping form, a key source of information for evaluating hiring and employment practices by colleges and universities. The Commissioners' proposal to eliminate the form as a cost-cutting measure — without a careful discussion of the consequences for enforcement — is troubling. Fortunately, after appeals from civil rights advocates explaining the data's importance, the EEOC, led by Commissioner Joyce Tucker, voted to retain the form.

B. Enforcement Performance

However, despite some progress in policy development, the EEOC continues to fall far short of its enforcement mandate. In particular, the EEOC's Equal Pay Act litigation is virtually non-existent; the agency brought only three Equal Pay Act cases in 1993 — and *none* in FY 1994.[3]

Nor has the agency developed a program to increase the number of class-action suits to target the systemic discrimination that affects so many workers. The number of class action suits plummeted from 66% of all cases in 1980 (the last year under Eleanor Holmes Norton's tenure) to 16% in 1994.[4]

Moreover, the agency's record in obtaining remedies for individual victims remains feeble: the settlement rate has been more than halved since 1980 (12.8% in FY 1994, down from 32.1% in FY 1980), while the rate at which cases are dismissed without any remedy at all has nearly doubled (55.9% in FY 1993, up from 28.5% in FY 1980).[5] And, although the Commission announced during the Bush Administration that it would adopt an aggressive new policy of seeking temporary restraining orders to stop ongoing sexual harassment during complaint processing,[6] this policy was never adequately implemented. Indeed, while the EEOC received more than 15,000 complaints of sexual harassment during the years 1989-1992, it reports that it sought temporary restraining orders in only five cases during that period.[7]

Furthermore, the EEOC has failed to reduce its monumental backlog of complaints, which reached 96,945 at the close of FY 1994.[8] If the EEOC were to close its doors immediately and accept no new charges for processing, it would still take more than 18 months to work through this backlog.[9] The average complaint processing time now stands at nearly 11 months — up from the 1980 average of three to six and a half months.[10] Unless and until these case management issues are addressed thoughtfully and promptly, tens of thousands of workers will be denied justice.

Serious concerns also remain about the quality of the EEOC's intake and investigation. EEOC intake personnel too often seem resistant to accepting charges of discrimination, instead discouraging individuals from filing charges in an effort to limit the caseload.[11] Imposing numerical quotas for investigative personnel to close cases, then rotating these investigators into intake, provides too many incentives to draft charges narrowly at intake or to reject them outright. Estimates indicate that as many as 70 to 80 percent of those individuals who come to EEOC offices leave without having a charge accepted. For example, the Women's Legal Defense Fund and 9to5, the National Association for Working Women have received reports from a variety of women that their attempts to file sexual harassment charges at EEOC field offices were rebuffed because their allegations did not include any instances of physical assault.[12]

The lack of bilingual intake staff generates considerable concern. For example, the Japanese American Citizens League reports that the EEOC's Los Angeles office at times had no staff who speak Spanish or any Asian language.[13] This has a great impact on the significant number of Asian Pacific Americans and Hispanics who have limited English proficiency.

Similarly, the National Council of La Raza reports that the number of EEOC charges filed on behalf of Hispanic workers, as well as the percentage of the EEOC's litigation docket devoted to national origin discrimination, is disproportionately small, indicating a failure in service to the Hispanic community.[14] Indeed, the Serrano Amendment — a provision of the Civil Rights Act of 1991 designed to ensure EEOC education and outreach efforts to traditionally underrepresented communities — has never been funded or implemented.

Intake personnel have also been reported as turning away individuals with disabilities without providing sufficient information and support. For example, complainants are often told erroneously that they cannot file a charge by mail — which disproportionately affects persons with disabilities who cannot drive.[15]

The quality of EEOC investigations remains poor, as plaintiffs' attorneys too often report inadequate investigations and analyses by some investigators in regional offices. Some investigators do not contact all possible witnesses, such as former employees, who might have information bearing on the veracity of the charge. For example, plaintiffs' attorneys and charging parties alike have reported to the Women's Legal Defense Fund and 9to5, National Association for Working Women that they received no-cause determinations from the EEOC without ever having been interviewed by an EEOC investigator.[16]

C. Recommendations for the EEOC

The Clinton Administration should consistently and decisively send the message through its enforcement efforts that discrimination — in any form and in any industry — is unacceptable. Specifically, the EEOC should take the following steps to boost its effectiveness:

Revamp the complaint processing system. Now that the EEOC's leadership is finally in place, the agency must engage in serious efforts to reduce its ever-increasing backlog and to improve the quality of its investigations and complaint resolution processes. In short, the EEOC needs to craft flexible new approaches to complaint processing that allow it to process charges speedily and thoroughly. Revitalizing the EEOC's enforcement capacity will no doubt require elements of alternative dispute resolution, early resolution, factfinding, triage, and other techniques.

More specifically, the EEOC's pilot mediation and triage programs are promising initiatives. But they will require refinement after evaluation by the new leadership. Of course, such a process should ensure that information on these programs' results to date are made available to the public — especially the civil rights community — for analysis, and should include opportunity for input and comment from such advocates.[17] Auditing or "testing" its own intake processes — as well as those of the state Fair Employment Practices Agencies (FEPAs) — would likely prove valuable in this evaluation process.

Enforce the Equal Pay Act. The agency should put the teeth back into the Equal Pay Act by bringing more Equal Pay Act cases and investing in targeted litigation in industries infected by systemic wage discrimination. This is especially important in light of national surveys that repeatedly find that working women identify pay discrimination as their top job concern.[18] Equal Pay Act enforcement should include aggressive litigation to ensure that non-job-related criteria are not allowed to justify pay disparities between men and women, and to take advantage of enforcement tools such as the Equal Pay Act's "hot goods" provision, which prohibits the shipping of goods produced by employers engaging in violations of the Act.

Improve service to traditionally underrepresented communities. The EEOC should make education and outreach to historically underrepresented communities a top priority. This includes securing adequate funding for and developing initiatives to implement the Serrano Amendment. Hiring and promoting bilingual staff — and generally hiring staff that reflects the diversity of the American workforce — is especially key to effective client service.

Attack systemic discrimination. The Commission should substantially increase its investment in "systemic" suits that challenge widespread patterns and practices of discrimination. Even though class actions have proven to be highly effective in attacking discrimination that infects an entire industry or profession — such as the grocery industry's practice of segregating women and people of color into dead-end jobs — and in getting the most out of limited federal dollars, the EEOC has in recent years limited its efforts to seek out or bring class actions. An effective systemic program should remove the disincentives that keep investigators from working up complex cases. Indeed, intake should be treated as a critical opportunity to identify patterns of discrimination and to identify key issues for investigation — rather than merely an opportunity for limiting caseload. Specialized intake personnel — who have no incentive to unfairly reject charges — trained to identify patterns of discrimination and advised by close attorney contact would greatly improve this process.

Vigorously enforce the Civil Rights Act of 1991. This involves negotiating and litigating for compensatory and, where appropriate, punitive damages on behalf of victims of intentional discrimination — and, in general, taking aggressive policy positions on the Act's application. In addition, the EEOC should develop a Memorandum of Understanding with the OFCCP that would enable the OFCCP to negotiate and conciliate for damages when it identifies intentional discrimination by federal contractors in the course of its compliance reviews — thus creating an important interagency tool to maximize enforcement resources.

Aggressively challenge the "double discrimination" experienced by women of color on the basis of gender as well as race and/or national origin. The EEOC should assert leadership in identifying and remedying the double discrimination faced by women of color, a group traditionally underserved by the EEOC and especially vulnerable to injury by lax enforcement policies. Older women and women with disabilities face double discrimination as well. The EEOC should train intake and investigative personnel in identifying double discrimination, and invest in targeted litigation to root out discriminatory employment practices particularly affecting women of color, and other victims of double discrimination.

Improve data collection to facilitate effective EEO enforcement. As currently developed, the various EEO recordkeeping forms collect data in categories far too general to provide meaningful enforcement information. Instead, the forms should ask for more detailed information about job classifications and pay scales to maximize their utility. In addition, making such information public would be extremely helpful in encouraging employer compliance and enabling workers to challenge illegal discrimination.

Take assertive policy positions in regulations, policy guidance, and litigation. The EEOC should give life to the letter and the spirit of its enforcement responsibilities by developing policy interpretations designed to accomplish the twin purposes of anti-discrimination law — compensating victims for their injuries and deterring discriminatory practices. For example, the EEOC should issue regulations on early retirement and the Older Workers Benefits Protection Act to ensure adequate protections against age discrimination.

The EEOC should also continue to challenge

"English-only" policies — the increasingly widespread practice of firing or disciplining Asian Pacific American or Hispanic workers for speaking their native language — as national origin discrimination. Accent discrimination also remains a significant problem for national origin minorities (indeed, the General Accounting Office found that one-third of employers surveyed refuse to hire people who sound foreign or have an accent)[19] and should also be attacked as a Title VII violation.

As another example, the EEOC should challenge "light duty" policies that create a disparate impact in violation of the Pregnancy Discrimination Act and the Americans with Disabilities Act. These include employer policies granting paid light duty only to workers who are temporarily disabled because of injuries suffered on the job, thus ensuring that workers temporarily disabled because of pregnancy, as well as workers with non-occupational disabilities, are excluded from alternative paid employment.

Improve public participation through open meetings. During the Carter Administration, under then-Chair Eleanor Holmes Norton, the EEOC held 50 to 60 public meetings a year.[20] During the Reagan and Bush Administrations, however, this commitment to a public dialogue steadily evaporated; indeed, the Commission held no more than four public meetings a year from 1990 through 1992. Under the Clinton Administration, the EEOC has only marginally increased opportunities for public participation. The EEOC can and should improve this record, encouraging meaningful input from the public.

III. The Department of Justice

The Civil Rights Division of the Department of Justice has primary responsibility within the federal government for enforcing federal laws banning discrimination on the basis of sex, race, national origin, disability, religion, and age. More specifically, the Civil Rights Division's Employment Litigation Section has the authority to bring suit when it has reason to believe that a state or local government has engaged in a pattern of practice of discrimination or when it has received an individual charge of discrimination by a state or local government on referral from the EEOC. The Section also has the authority to litigate violations of Executive Order 11246 and section 503 of the Rehabilitation Act by federal contractors on referral from the OFCCP.

Under Presidents Nixon, Ford, and Carter, the Department of Justice had been a leader in the enforcement of federal equal employment opportunity law by initiating precedent-setting employment litigation and developing effective and innovative remedies for discrimination. However, under Assistant Attorney General William Bradford Reynolds and the Reagan Administration, the Department concentrated instead on dismantling settled areas of civil rights law and policy. This retrenchment continued through the Bush Administration when, for example, the Department of Justice led the opposition to the Civil Rights Act of 1991.

A. Policy Developments

Under Attorney General Janet Reno, Solicitor General Drew Days, and Assistant Attorney General for Civil Rights Deval Patrick, the Clinton Administration's Department of Justice has consistently championed effective civil rights enforcement — a marked and welcome change from its role during the Reagan and Bush Administrations.

For example, the Department has generally used its role as Supreme Court advocate to urge the Court to give life to both the letter and the spirit of anti-discrimination law. Cases in which the Department has supported the rights of victim of job bias include:

- *Harris v. Forklift Systems,* where the Supreme Court agreed that sexual harassment victims need not prove that they have suffered psychological damage before asserting their right to a harassment-free workplace;
- *Landgraf v. USI Film Products* and *Rivers v. Roadway Express*, where the Court disagreed with the Clinton Administration and civil rights advocates to hold instead that sections 101 and

102 of the Civil Rights Act of 1991 do not apply retroactively;

- *Garcia v. Spun Steak*, where the Court denied *certiorari*, despite arguments by the Clinton Administration and civil rights advocates that "English-only" workplace rules constitute illegal national origin discrimination under Title VII;
- *McKennon v. Nashville Banner Publishing Co.*, a case currently pending before the Court that will decide whether employers can rely on evidence of an employee's misconduct discovered *after* a discriminatory employment decision to insulate itself completely from liability for its actions.

The Department has also reasserted leadership on the critical issue of affirmative action — expressing key support for a tool that has been proven effective in expanding equal employment opportunity. For example, in *U.S. v. Board of Education of the Township of Piscataway*, the DOJ supported a New Jersey school board's affirmative action policy designed to promote racial diversity among its faculty. The Department argued that the school board did not violate Title VII when, confronted with the need to lay off one of two teachers with identical seniority and qualifications, it retained the only black teacher in the high school business education department. The Department's *amicus* brief filed with the Third Circuit in September 1994 represents a marked shift from the position taken by the Bush Administration, which had challenged the school board's action as illegal reverse discrimination.

Moreover, the Department of Justice has expressed its support for significant civil rights legislation, such as the Equal Remedies Act, the Justice for Wards Cove Workers Act, and legislation to overturn the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.[21]

On the other hand, however, the Department supported the denial of age discrimination protections to police officers and firefighters. In July 1994, the Department informed congressional conferees on the crime bill that it supported a four-year extension of the Age Discrimination in Employment Act's exemption allowing state and local governments to discriminate against public safety workers — police officers and firefighters — on the basis of age. Such a position conflicts with basic civil rights protections, by creating waivers for certain employers allowing overt age discrimination without regard to workers' competence and experience.

B. Enforcement

Under the Clinton Adminstration, the Employment Litigation Section has filed a total of 30 cases alleging job discrimination. Twelve of these cases alleged pattern-and-practice violations of Title VII and one alleged a pattern-and-practice violation of the Americans with Disabilities Act; the remainder were based on individual Title VII charges referred by the EEOC. These cases focused largely on sexual and racial harassment, as well as on discrimination based on race, sex, and national origin in recruitment, hiring, and promotion.[22]

C. Recommendations for the Department of Justice

Assert leadership in articulating, implementing, and coordinating forceful civil rights advocacy by the Clinton Administration. The Department should assert leadership in providing analysis to the Administration on the civil rights ramifications of pending legislation — like health care reform and job training efforts. It should follow up by ensuring that the Administration actively works on behalf of policy that advances equal employment opportunity, including initiatives such as the Equal Remedies Act, the Civil Rights Procedures Protection Act, and others described above. The Administration, led by the Department of Justice, should not only express support for civil rights policy, but should also work aggressively for its enactment.

The Civil Rights Division should also work with the Department's Civil Division to ensure that the government's legal positions as an employer are consistent with expanding equal employment opportunity. In particular, it should facilitate settlement of meritorious discrimination charges against the federal government.

Develop an aggressive and systematic enforcement agenda that maximizes available resources. The Department should identify key cases against state and local governments that will develop an expansive jurisprudence under the Civil Rights Act of 1991. Areas that merit concentration include double discrimination based on both gender as well as race and/or national origin, pay discrimination, and class action sexual harassment cases. The Department should also affirm its authority, upon referral from the OFCCP, to bring suit against federal contractors in violation of their anti-discrimination obligations — and should capitalize on any opportunity to develop significant case law in this area. Similarly, the Department should assert leadership in the use of innovative enforcement tools — such as the use of "testers" to identify discrimination by state and local governments.

IV. The Office of Federal Contract Compliance Programs

The OFCCP enforces Executive Order 11246, which prohibits discrimination by federal contractors on the basis of sex, race, color, religion, and national origin and requires contractors to take affirmative action to ensure equal employment opportunity. It also enforces section 503 of the Rehabilitation Act (imposing anti-discrimination and affirmative action requirements on federal contractors with respect to qualified individuals with disabilities) and the Vietnam-Era Veterans' Readjustment Assistance Act (imposing anti-discrimination and affirmative requirements on federal contractors with respect to Vietnam-era and special disabled veterans of all wars). When effectively enforced, the Executive Order provides a tremendously important enforcement tool through its requirement that federal constructors take affirmative action to expand employment opportunities.

Unfortunately, OFCCP enforcement nosedived during the 1980s. As a 1987 House Education and Labor Committee report concluded, "OFCCP's enforcement program has been virtually ineffective since 1980... Effective enforcement has come to a virtual standstill."[23] Although the agency's performance improved somewhat under the leadership of Cari Dominguez during the Bush Administration, it has only just begun to regain its pre-1980 levels of effectiveness.

A. Policy Developments

The appointment of Shirley Wilcher as Deputy Assistant Secretary for Federal Contract Compliance Programs shows the value of committed, experienced leadership. Under Wilcher's leadership, the agency has clearly emphasized its commitment to law enforcement — thus sending a strong message invaluable in changing discriminatory behavior by contractors.

For example, the OFCCP has developed a vision statement that provides a model of a solid and effective enforcement strategy, adopting principles long recognized as critical to successful civil rights enforcement. These strategies include: targeted enforcement efforts, with emphasis on megaprojects, growth industries, and repeat violators; the development and use of the full range of available sanctions for noncompliance; and expedited enforcement of violations by contractors in breach of conciliation agreements. The agency has also embarked on innovative regional initiatives designed to bolster its effectiveness, including employment "testing" to identify discrimination by contractors, as well as an examination of the impact of corporate downsizing on equal employment opportunity requirements. This package clearly communicates the agency's seriousness of purpose with respect to its enforcement obligations.

In another significant policy development, the OFCCP has launched long-overdue efforts at regulatory reform — the first updates and revisions to the Executive Order regulations since the Nixon Administration.

B. Enforcement

As developed by the Bush Administration, the Department of Labor's Glass Ceiling Initiative focused primarily on public relations rather than law enforcement. Under the Clinton Administration, glass ceiling compliance reviews — examinations of contractors' advancement plans to evaluate how employees are selected for promotion to key leadership positions — have finally generated enforcement actions. These include a $600,000 pay discrimination settlement with Fairfax Hospital, followed in September 1994 by three additional pay discrimination settlements totalling approximately $500,000.

All in all, the OFCCP conducted 44 glass ceiling reviews in FY 1994, up from a total of 19 in 1993.[24]

Another example of effective enforcement — involving double discrimination based on both race and sex — resulted in a conciliation agreement providing more than $600,000 to a class of African American women after the OFCCP found a pattern of race and sex discrimination in hiring by the San Diego Marriott Hotel and Marina.

The OFCCP's attention to pay discrimination issues is particularly important given women's repeated insistence that unequal pay is their top job concern. Moreover, such high-stakes settlements send contractors the unmistakable message that contractors who engage in discriminatory practices will be required to take corrective action and provide remedial relief.

Secretary of Labor Robert Reich and the OFCCP have also begun to break the logjam of administrative appeals of Executive Order cases awaiting action by the Secretary — some of which have languished more than 15 years without action! For example, more than 17 years after the OFCCP concluded that Honeywell had engaged in sex discrimination by steering women into dead-end jobs, the Department of Labor finally settled the case on behalf of 6,000 women for $6.5 million — the third highest settlement in OFCCP history. Settlements and decisions by the Secretary in this and other administrative appeals signal meaningful action in this area.

Yet another sign of improved enforcement is the OFCCP's effective use of its debarment authority — the power to cancel or deny federal contracts — against contractors who breach conciliation agreements with the OFCCP or otherwise engage in repeat violations. The OFCCP's record-setting use of this most powerful tool — with five debarments in FY 1994 — sends a clear signal to contractors that the agency takes its enforcement mission seriously, and again reflects a dramatic change from the Reagan and Bush Administrations, which invoked this power only eight times in the 11 years between 1982 and 1993.[25]

C. Recommendations for the OFCCP

Work with the EEOC to develop a Memorandum of Understanding that allows the OFCCP to negotiate for damages under the Civil Rights Act of 1991. The enactment of the Civil Rights Act of 1991 enabled victims of intentional discrimination under Title VII and the Americans with Disabilities Act to seek limited compensatory and punitive damages. The EEOC and OFCCP should develop a Memorandum of Understanding (MOU) that designates the OFCCP as the EEOC's agent when it identifies intentional discrimination by federal contractors as part of a compliance review, thus authorizing the OFCCP to negotiate for appropriate damages. Such an MOU would parallel an already-existing agreement between the two agencies with respect to ADA and section 503, and would create an important interagency means of maximizing enforcement resources.

Examine links between family-friendly workplace policy and equal employment opportunity. OFCCP compliance reviews should regularly examine the relationship between family-friendly policies and equal employment opportunity. For example, compliance reviews should determine whether workers who need parental leave are "mommy-tracked" into dead-end jobs or whether contractors instead develop meaningful family-friendly policies that actually facilitate working parents' opportunities for career development. And, of course, OFCCP compliance reviews should include an evaluation of whether the contractor is in compliance with the Family and Medical Leave Act.

Address issues related to contingent workers. The OFCCP should develop and implement policy interpretations that maximize Executive Order coverage of the ever-increasing contingent workforce that includes part-time, temporary, seasonal, and leased workers and independent contractors. Too often, such workers are excluded from EEO protections. The OFCCP should, in particular, target the temporary help industry for high-profile enforcement. And it should assess whether contractors are engaging in disparate impact violations by denying benefits to workers because of their contingent workforce status — a status disproportionately held by women and people of color.

Comprehensive regulatory reform should maintain and expand the use of effective enforcement tools. As a rule, the agency should use regulatory reform as an opportunity to expand, not contract, its range of effective enforcement tools. For example, as the OFCCP embarks on its long-overdue regulatory revisions, it should continue its use of preaward compliance reviews as an effective means of enforcing contractor compliance. Indeed, contractors are probably most amenable to modifying their employment practices prior to receiving contractor awards, and the agency should capitalize on this opportunity for leveraging compliance. The OFCCP should also identify and implement a broad range of penalties for illegal discrimination, including monetary sanctions and the withholding of progress payments.

Update sex discrimination guidelines to reflect major legal developments. Updates to the OFCCP's guidelines on sex discrimination under the Executive Order were proposed by the Carter Administration, only to be "frozen" by the incoming Reagan Administration and never implemented. The OFCCP should at long last update the guidelines to reflect key legal developments of the last 15 years, such as the Pregnancy Discrimination Act, the EEOC's guidelines on sexual harassment, and various Supreme Court decisions.

Update contractors' goals for the employment of women and people of color in the construction industry. Construction contractors currently have a hiring goal of 6.9% for women — a goal that has not been updated since the 1970s. Similarly, the goals for minority employment in the construction industry are based on 1970 Census data and have not been updated. These goals should be revised to reflect demographic changes of the last 20 years and to encourage increased employment of women and people of color in nontraditional jobs. The OFCCP should also develop means for generally improving enforcement of the Executive Order in the construction industry — e.g., by thorough pre-award compliance reviews of "megaprojects" that promise to create large numbers of jobs; encouraging the hiring of equal employment opportunity and affirmative action managers; developing links to community organizations that can provide referrals to women and minority applicants; and requiring that contractors provide their workforce with sexual harassment training.

Endnotes

[1] 500 U.S. 20 (1991).

[2] The conferees cut the EEOC's appropriation to $233 million, after the House and Senate had approved $238 million and $ 240 million, respectively, in funding.

[3] WOMEN EMPLOYED, EEOC ENFORCEMENT STATISTICS (1994).

[4] *Id.*

[5] *Id.*

[6] EEOC PRESS RELEASE, *New EEOC Procedure Targets Sexual Harassment*, March 13, 1991.

[7] EEOC Memorandum, October 31, 1994.

[8] WOMEN EMPLOYED, EEOC ENFORCEMENT STATISTICS (1994) (reflecting backlog through the third quarter of FY 1994).

[9] EEOC PRESS RELEASE, January 12, 1994.

[10] *Id.*

[11] *E.g., see generally* 9TO5, NATIONAL ASSOCIATION FOR WORKING WOMEN, REVITALIZING THE EEOC: SURVEY RESULTS AND RECOMMENDATIONS (1994).

[12] *E.g.,* 9TO5, NATIONAL ASSOCIATION FOR WORKING WOMEN, REVITALIZING THE EEOC 6, 8.

[13] Letter of Japanese American Citizens League to Claire Gonzales, December 14, 1992.

[14] NATIONAL COUNCIL OF LA RAZA, THE EMPTY PROMISE: THE EEOC AND HISPANICS, (December 1993).

[15] BAZELON CENTER FOR MENTAL HEALTH, RECOMMENDATIONS TO THE EEOC (June 1994). Disability rights issues are covered in more detail in the chapter of this report on the Americans with Disabilities Act.

[16] 9TO5, REVITALIZING THE EEOC 8.

[17] For example, ADR programs should provide certain safeguards for workers' rights, including: ensuring that ADR is conducted by practitioners who have substantive EEO expertise; recognizing that ADR is not appropriate for all situations, such as class actions or cases that have significant precedential value; and engaging in ADR only when it is fully voluntary on the part of both parties.

[18] *E.g.*, U.S. DEPT. OF LABOR, WOMEN'S BUREAU, WORKING WOMEN COUNT! (1994).

[19] Letter of Japanese American Citizens League to Claire Gonzales, December 14, 1992.

[20] *Senate Subcommittee on Employment and Productivity, Oversight Hearings on the EEOC*, April 1992.

[21] 113 S.Ct. 2742 (1993).

[22] DEPARTMENT OF JUSTICE, EMPLOYMENT LITIGATION SECTION ACCOMPLISHMENTS: JANUARY 1993-SEPTEMBER 1994 (1994).

[23] A REPORT ON THE INVESTIGATION OF THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS BY THE MAJORITY STAFF, COMMITTEE ON EDUCATION AND LABOR, U.S. HOUSE OF REPRESENTATIVES, 100th Cong., 1st Sess., October 1987.

[24] BNA EMPLOYMENT DISCRIMINATION REPORT, ENFORCEMENT ACTIONS DECLINING AT OFCCP, BUT SETTLEMENTS RISE (November 30, 1994).

[25] DEPARTMENT OF LABOR, OFCCP ACCOMPLISHMENT DATA, FISCAL YEARS 1982 THROUGH 1994 (1994).

Chapter XIII

The Employment Non-Discrimination Act

by Chai R. Feldblum and Stephen J. Curran

I. Introduction

Gay, lesbian, and bisexual Americans have been subjected to a long and pervasive history of discrimination. Americans who exhibit an emotional or physical attraction to members of the same sex have been persecuted since the earliest days of the American colonial period.[1] By the middle of this century, sexual orientation-based discrimination had grown to the point where it permeated virtually every aspect of an openly gay person's life. In recent memory, for example, individuals have been denied the ability to enter the United States or to hold a federal job simply because they were perceived to be gay.[2]

Today, more than 25 years after the Stonewall revolt energized the modern gay civil rights movement, gay Americans still face pervasive discrimination in virtually every sphere of their public and private lives. Openly gay people are routinely refused employment, housing, or other accommodations because of their sexual orientation. In many states it is a criminal offense for a gay couple to engage in consensual sex in the privacy of their home. In virtually all states, gay relationships are not recognized under the law, and gay individuals may be deprived of the custody of their biological children and the opportunity to adopt children.[3] All too frequently, prejudice against gay people is also expressed in violence. Empirical studies reveal that gay men and lesbians are among the most frequently targeted victims of hate crime.[4]

The vast majority of gay Americans are afforded little or no legal protection against official or private discrimination. The U.S. Constitution, as it is currently interpreted by most courts, provides little protection against official discrimination against gay people and virtually no protection against private discrimination.[5] No federal law prohibits the discrimination against gay individuals by public or private entities. The limited statutory protections that exist have been passed in patchwork fashion at the state and municipal level.[6]

II. The Road to ENDA

The lesbian, gay, and bisexual community has attempted for years to achieve protection of basic civil rights similar to that provided by federal law to other minorities and to women. Civil rights bills that prohibit discrimination based on sexual orientation have been circulating in Congress for more than a decade.[7]

A number of factors in the fall of 1992 combined to dramatically improve the prospects of gay civil rights legislation. One was the election of a president who had embraced the gay community and the cause of gay civil rights during his campaign. Equally important, however, was an accompanying shift that occurred within the broader civil rights community. An important threshold was crossed in October 1992, when the Executive Committee of the Leadership Conference on Civil Rights (LCCR) endorsed the concept of a gay civil rights bill. This endorsement by the legislative arm of the most broadly based mainstream civil rights organization made it conceivable for the first time that significant movement could be made on a gay civil rights bill.

In January 1993, a group comprised of representatives of gay and non-gay civil rights groups was established under the auspices of the LCCR to tackle the task of drafting a gay civil rights bill.[8] The drafting sessions created an opportunity for lawyers who had done traditional civil rights work to work with lawyers who had focused primarily on gay rights litigation. This combination allowed the group to explore appropriate means of drafting legislation that would accommodate broad civil rights concerns, as well as specific gay rights concerns. The sessions also enabled political concerns to be aired and dealt with in the drafting of the legislation.[9]

One of the major changes the group made was to draft a free-standing bill, similar to the free-standing Americans with Disabilities Act of 1990 (ADA). This was in contrast to previous gay civil rights bills that had simply amended existing civil rights laws. In addition, the group decided to focus on employment discrimination — an area in which there exists both serious discrimination and strong public sentiment against such discrimination.[10] By early summer 1994, this effort had produced a draft Employment Non-Discrimination Act (ENDA).[11]

III. ENDA

ENDA is modeled principally after Title VII, the employment section of the Civil Rights Act of 1964. It is designed to cover the same entities as Title VII without disturbing Title VII's protections against discrimination based on race, color, national origin, gender, and religion. Specifically, ENDA would prohibit employers (including government employers), employment agencies, and labor organizations from discriminating against individuals in employment or employment opportunities based on the individual's actual or perceived sexual orientation. Like similar provisions in Title VII, the ADA and the Fair Housing Act of 1968 (as amended), ENDA would prohibit discrimination based on the sexual orientation of someone with whom an individual associates, and would prohibit coercion, intimidation, threats, or interference against individuals exercising or enjoying rights protected by the bill.

ENDA would exempt certain categories of employers. Like the ADA and Title VII, ENDA includes a small business exemption for employers with fewer than 15 employees. ENDA also includes an exemption for religious organizations, associations, and societies, including educational institutions supported by religious corporations. ENDA does not apply to the relationship between the U.S. government and members of the armed forces and thus would not affect current law on gay men, lesbians, and bisexuals in the military.

ENDA is not a perfect mirror of Title VII or any other bill. Modifications were required that recognized the unique circumstances of anti-gay discrimination and the difficult political environment the bill would have to weather. Of particular concern was the ability of the bill to withstand the inevitable charges of anti-gay activists that ENDA seeks to accord gay people "special rights" not enjoyed by heterosexuals. As a result, ENDA's language is designed to make clear that no such rights are granted — ENDA simply would prohibit employers from discriminating against any employee, gay or heterosexual, based on sexual orientation. ENDA also explicitly provides that no employer would be required to provide benefits to an employee's same-sex partner.

ENDA incorporates the enforcement mechanisms and remedies of Title VII. Plaintiffs would be required to exhaust their administrative remedies with the Equal Employment Opportunity Commission (EEOC) prior to filing suit in federal court. Proposed remedies include injunctive relief such as job reinstatement, back pay, and attorney's fees. Compensatory and punitive damages would also be available, although, as in Title VII, such damages would not be allowed to exceed the caps established by the Civil Rights Act of 1991.

After more than 18 months of work by members of the various organizations and members of Congress, ENDA was formally introduced as a bill in both the House of Representatives and the Senate on

June 23, 1994.[12] The bill was referred to the Labor and Human Resources Committee in the Senate and to the Education and Labor Committee in the House. Because the bill was introduced late in the congressional session, and onto a congressional calendar dominated by the health care reform and crime bills, supporters of the bill focused their efforts on having hearings held in at least one of the Houses and on enlisting the support of as many members of Congress as possible, thereby positioning the bill for early introduction in the 104th Congress.

The first of these objectives was achieved on July 29, when the Senate Labor and Human Resources Committee held the first congressional hearings ever to consider a gay civil rights bill. Statements and testimony by a wide variety of ENDA supporters, as well as by some opponents to the bill, were considered at the hearing.[13] Of key importance, ENDA also received a level of support from mainstream civil rights groups and from members of Congress that was unprecedented for a gay civil rights initiative. By the close of the 103d Congress, 137 Representatives and 30 Senators had agreed to co-sponsor ENDA, including Republicans in both houses.

IV. Conclusion

The road toward full acceptance of civil rights for gay men, lesbians, and bisexuals will be long and arduous. One significant step has been taken, however. The community effort demonstrated in the development of a federal bill to prohibit employment discrimination based on sexual orientation is no less than historic. Gay and lesbian civil rights groups, race and ethnicity groups, disability groups, religious groups, women's groups, and Democratic and Republican members of the 103rd Congress comprised a historic coalition that pushed ENDA to heights previously unachieved by any gay civil rights legislation. This unprecedented partnership laid the essential foundation for a legal framework that will eventually achieve the ultimate goal of securing freedom from sexual-orientation based discrimination for all Americans. Although the 104th Congress promises to be a much more challenging environment for gay rights measures than its predecessor, the broad support which ENDA gained in its brief 1994 legislative debut bodes well for the next stage of the gay civil rights story.

Endnotes

[1] *See* Johnathan N. Katz, *Plymouth Colony Sodomy Statutes and Cases*, in GAY/LESBIAN ALMANAC 74-122 (1983).

[2] The U.S. Supreme Court held in 1967 that the Immigration and Naturalization Service was authorized to prevent gay people from entering the United States on the grounds that they demonstrated "pathological" personality traits. *Boutillier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967). *See also* Robert L. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW 439 (1994), which describes the history of immigration discrimination against gay people.

More than 1,700 individuals perceived to be gay were denied employment with the federal government during the "red scare" of the late 1940s and early 1950s because it was believed that homosexuality was affiliated with communist sympathies. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983). Dismissal from the civil service based solely on sexual orientation remained permissible up until a series of court challenges prompted the Civil Service Commission to modify its employment policies in the mid-1970s. WILLIAM B. RUBENSTEIN, LESBIANS, GAY MEN AND THE LAW 291 (1993).

[3] The nature and extent of these forms of discrimination are well described in a series of law review articles that argue laws that discriminate against gay people should be subjected to the same form of close judicial scrutiny as laws that discriminate based on race, national origin, or gender. *See* Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARVARD LAW REVIEW 1508 (1989); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARVARD LAW REVIEW 1285 (1985); and Note: *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 Southern California Law Review 797 (1984).

[4] Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARVARD LAW REVIEW 1508 (1989), citing two studies finding one in five gay men and nearly one out of every 10 lesbians reported they have been physically assaulted because of their sexual orientation. *See also*, Herek, *Hate Crimes Against Lesbians and Gay Men*, 44 AMERICAN PSYCHOLOGIST 948 (1989).

[5] Although some courts have found laws that discriminate against people solely because of their sexual orientation to be unconstitutional, *see e.g., Jantz v. Muci* 759 F. Supp. 1543 (D. Kan. 1991), *rev'd on other grounds* 976 F.2d 623 (10th Cir. 1992), many still find such laws to be permissible, *see, e.g., Childers v. Dallas*, 513 F. Supp. 134 (N.D. Tex. 1981) *aff'd* 669 F.2d 732 (5th Cir. 1982).

The courts' treatment of challenges to sodomy statutes also reflects a bias against homosexuality, although sodomy laws *per se* usually apply to both homosexual and heterosexual behavior. For example, the Supreme Court rejected a gay man's challenge of a state anti-sodomy statute, holding the federal constitutional rights to privacy and due process did not extend to "homosexual sodomy." *Bowers v. Hardwick,* 478 U.S. 186 (1986). A few months after it decided Hardwick, the Supreme Court declined to hear a similar case in which a state court found these same constitutional rights prevented the conviction of a man for engaging in heterosexual sodomy. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied,* 479 U.S. 890 (1986).

[6] Only eight states (California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin) and approximately 140 municipalities nationwide have enacted antidiscrimination laws that include sexual orientation. *Hearings on S. 2238 before the Senate Committee on Labor and Human Resources,* 103rd Congress, 2d Session 106 (1994) (statement of Professor Chai Feldblum submitting data compiled by Rhonda M.

Bethea and John King).

[7] *See, e.g.*, S. 1432, 99th Cong., 1st Sess. (1985).

[8] Professor Chai Feldblum, a co-author of this piece, was hired by the Human Rights Campaign Fund (HRCF) in January 1993 to serve as the legislative lawyer for the drafting of the civil rights bill. HRCF is a political organization dedicated to ending discrimination against lesbian and gay Americans. Stephen Curran, the other co-author, worked with Professor Feldblum on ENDA beginning in June, 1994.

[9] The role of the "legislative lawyer" in these sessions is to understand the political concerns, be versed in the legal background of the particular issue and develop appropriate and creative legislative approaches. *See* Feldblum, Letter to the Editor, *printed in* NATIONAL LAW JOURNAL, Feb. 14, 1994 (describing the role of the legislative lawyer).

[10] For example, a recent poll indicates almost three out of every four Americans favor equal rights for gay and lesbian Americans in terms of job opportunities. NEWSWEEK PRESS RELEASE of Feb. 6, 1994 (discussing results of Feb. 3-4, 1994 Newsweek Poll).

[11] S. 2238, 103d Congress 2d Session (1994); H.R. 4636, 103d Congress, 2d Session (1994).

[12] 140 Cong. Rec. S7581 (daily ed. June 23, 1994). The bill was introduced in the Senate with 29 co-sponsors and in the House of Representatives with 118 cosponsors. This is the highest number of original co-sponsors ever garnered by a gay civil rights bill.

[13] The following individuals provided oral testimony in support of the bill: Cheryl Summerville and Ernest Dillon (individuals who have experienced job discrimination based on sexual orientation); Justin Dart, Chairman, President Bush's Committee on Employment of People with Disabilities; Warren Phillips, former Chief Executive Officer and Chairman, Dow Jones & Company, Inc; Steven Coulter, Vice President, Pacific Bell; Richard Womack, Director of Civil Rights, AFL-CIO; and, Professor Chai Feldblum on behalf of the Leadership Conference on Civil Rights. *Hearings on S. 2238 before the Senate Committee on Labor and Human Resources*, 103rd Cong., 2d Sess. (1994). Additionally, the following individuals submitted written statements or communications in support of the bill: Coretta Scott King of the Martin Luther King Jr. Center for Non-Violent Social Change; Barry Goldwater, former Senator from the State of Arizona, William Weld, Governor of the Commonwealth of Massachusetts, Christine Todd Whitman, Governor of the State of New Jersey; Deval Patrick, Assistant Attorney General, Department of Justice Civil Rights Division; Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights; Philippe Kahn, President, Chairman, and Chief Executive Officer, Borland International; as well as many other prominent political, business, academic, and civic leaders. *Id.* Two individuals provided oral testimony opposing ENDA: Joseph E. Broadus, George Mason School of Law; and, Robert Knight, Family Research Council. Paul Cameron of the Family Research Institute submitted written testimony opposing the bill. *Id.*

Chapter XIV

Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity

by Arthur A. Baer and Pamela S. Karlan[1]

Today we are at a critical crossroads with respect to the voting rights and equal electoral opportunity of traditionally disenfranchised members of our electorate. Over one hundred years ago the Supreme Court in *Yick Wo v. Hopkins*,[2] stated that the right to vote is "a fundamental political right, because preservative of all rights." The statement is no less true today.

African Americans, Latinos, Asians, and Native Americans, those protected under the Voting Rights Act, often represent the poorest members of our society. More often than not they are relegated to live in areas segregated by race, and in communities of poverty. They also often live in jurisdictions where whites vote as a bloc. Were it not for the protections of the Voting Rights Act, the preferred candidates of these protected classes would not sit in the halls of government. To deny them such a voice would be to deny those without the power of wealth, the power of government. It would relegate them to powerlessness, continued substandard education, segregation and poverty.

It is through democratic equality that those who are poor can change public policies to ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas.

This is a time both of tremendous opportunity and of tremendous danger for voting rights. The Supreme Court's decisions in *Shaw v. Reno*[3] and *Holder v. Hall*[4] threaten to gut the Voting Rights Act's promise of equal electoral opportunity and to divert the Civil Rights Division's resources away from proactive litigation into defense of already-won gains. By its holdings in *Rojas v. Victoria Independent School District*,[5] and *Presley v. Etowah County*,[6] the Court has effectively permitted recalcitrant jurisdictions to nullify the vote of Latino and African American voters by taking away the legislative powers of their chosen representatives.

Other decisions by lower courts have also eroded the vitality of the Act. For example, in the area of bilingual voter assistance, the United States Court of Appeals for the Tenth Circuit in *Montero v. Meyer*[7] and the Eleventh Circuit in *Delgado v. Smith*[8] limited the reach of the Act's bilingual provisions in cases involving English-only ballot initiatives. These provisions are critical for limited-English proficient citizens if they are to equally participate in the electoral process. In the area of access to the exercise of the franchise, the United States Court of Appeals for the Third Circuit, in *Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*,[9] limited the Act's application to a non-voting purge, which in 1991 resulted in the purging of 27% of Latino registrants and 25.8% of African American registrants, but only 17.3% of white registrants.

Despite these setbacks, we now have a great opportunity to move ahead in the struggle for electoral equality. In August 1992, §203 of the Voting Rights Act was extended until 2007 and expanded in its application. It now requires bilingual assistance and materials to be provided in many jurisdictions that were previously not covered under the Act although thousands of limited-English proficient citizens lived in them. In May 1993, after years of efforts by advocates and their supporters, the National Voter Registration Act (NVRA) was signed into law by President Clinton, and beginning on January 1, 1995, it brings the promise of substantially increasing voter registration through such mechanisms as agency based registration and the prohibition of non-voting purges nationwide. It is critical for the Administration to be a strong advocate for enforcement of the Act and to fight retrenchment of the Act by an all too often unsympathetic judiciary.

Within the Civil Rights Division and the Voting Rights Section, this has been a period of reorganization and reassessment. Assistant Attorney General Deval Patrick has appointed a new acting section chief for the Voting Rights Section as part of his reorganization and, in response to *Shaw* and its progeny, has created a special Task Force to defend majority non-white districts from constitutional attack. Similarly, the Division is gearing up to enforce the provisions of the NVRA, especially in states that refuse to comply with the Act's mandates.

What follows below is an overview of a proposed agenda for voting rights enforcement by the Administration. Part I provides an overview of the constitutional and statutory scheme enforced by the Department of Justice. Part II provides a proposed agenda for pressing voting rights issues facing the Department. It covers four major areas: (1) redistricting and section 5 enforcement, (2) Section 203 and the enforcement of the bilingual provisions of the Act, (3) enforcement of the National Voter Registration Act, and (4) election day monitoring and enforcement.

I. The Constitutional and Statutory Scheme Enforced By the Department of Justice

The right to vote embodies a constellation of concepts — the right to *participate* by registering and casting a ballot; the right to *elect* candidates of one's choice; and the right to *effective postelection representation* within governing bodies, that is, to a voice in the larger political processes of democracy. In each of these areas, the Department plays a significant role.

1. Participation

There are two primary federal statutes protecting the right to participate. First, the Voting Rights Act of 1965 prohibits discrimination on the basis of race or membership in a protected language minority group — Asians, Native Americans, Alaskan Natives, and Spanish speakers. Section 2 of the Act applies nationwide; it prohibits using voting practices, standards, procedures, or prerequisites that have a disparate impact on members of a protected class. It has been used, for example, to attack some restrictive voter registration requirements and the siting of polling places in locations inaccessible or hostile to minority voters. The bilingual provisions of the Act — principally §§ 4 and 203 — apply in jurisdictions with substantial concentrations of non-English speakers or voters with only limited English proficiency. Section 203 was amended in 1992, bringing additional communities within its scope. The bilingual provisions require covered jurisdictions to provide election materials and assistance in the relevant second language as well as in English. Finally, in specified jurisdictions with a history of using certain restrictive practices and depressed political participation, section 5 of the Voting Rights Act requires federal "preclearance" prior to any changes in existing voting regulations.[10]

Most of this preclearance is conducted through an administrative process within the Voting Section of the Civil Rights Division, although jurisdictions have the option of seeking judicial preclearance in the United States District Court for the District of Columbia [hereafter the "D.D.C."]. Under section 5, the Department of Justice has recently lodged objections to such practices as changes in polling places and purges of registration rolls. Moreover, in these same jurisdictions the Department has authority to ensure fair elections by appointing Federal voting examiners and election observers.

Second, the NVRA, signed into law by President Clinton last year, with an effective date in most states of January 1, 1995, requires states to expand registration opportunities. The NVRA requires states to register voters as part of the process of providing drivers' licenses and to conduct voter registration by mail and at public-assistance and disability-assistance agencies. It also encourages states to conduct registration at other government and private agencies as well. Moreover, the NVRA eliminates certain kinds of purges for non-voting. The Federal Election Commission has proposed various implementing regulations and most states have completed or are in the process of considering legislation to implement the NVRA. The NVRA marks a sea-change in the philosophy of voter registration within the United States — from the view that voting is a privilege, with the subtext that registration should be difficult to ensure that only informed, committed citizens participate, to the view that voting is a right of all eligible citizens that the government has an affirmative duty to advance.

In addition to these two statutory schemes, a range of constitutional amendments protect the right to vote. In particular, the Fourteenth and Fifteenth Amendments prohibit intentional discrimination on the basis of race in state regulation of the right to participate.

2. Election

At least since the one-person, one-vote cases of the early 1960s, courts and Congress have recognized that the right to vote may be impaired by *dilution* as well as by outright disenfranchisement. In particular, the choice of election systems — particularly the decision to use at-large elections or multimember districts instead of single-member districts — and decisions about where to draw district lines may affect voters' ability to elect candidates of their choice.

The primary statutory protections against vote dilution are sections 2 and 5 of the Voting Rights Act. These statutes have been used by the courts and by the Department in the preclearance process to reject states' and localities' use of at-large elections in areas with substantial minority populations and a history of racially polarized voting behavior and to reject decennial apportionment plans that do not provide African American, Latino, Asian American, or Native American groups with an equal opportunity to elect candidates. In general, the preferred remedy has been the creation of minority-opportunity districts — single-member districts whose demographic composition gives non-white or non-Anglo voters a realistic opportunity to elect the representatives they favor.

The Department of Justice has been especially vigorous in the preclearance process. Following the 1990 census, every state was required to redraw its congressional and state legislative districts, and most localities were also required to redraw the districts from which school board, county commission, city council, and other bodies' members were chosen. In virtually every state subject to preclearance, the Department objected to either the congressional or state legislative plans. The result of the Department's objections — and the implicit threat of section 2 litigation — was the creation of an unprecedented number of minority-opportunity electoral districts. The results in the 1992 elections were striking — a virtual doubling of the number of black representatives in Congress as well as substantial gains for Latinos, and concomitant gains in state and local elective bodies.

In addition to the Voting Rights Act, the Fourteenth Amendment prohibits intentional dilution of the voting strength of political, as well as racial groups. As a practical matter, however, racial minorities today nearly always proceed under the Voting Rights Act, and political groups have yet to win a constitutional vote dilution case.

3. Postelectoral representation

In 1992, the Supreme Court decided *Presley v. Etowah County Commission*, which rejected the argument that the Voting Rights Act covers changes of authority within elected bodies, even though such changes might render minority electoral gains at the polls essentially illusory by stripping officials elected by minority voters of the traditional powers of their offices. *Presley* did, however, leave open the question whether *some* transfers of authority might be so extensive so as to amount to the abolition of the elected office, a change that under existing caselaw would require preclearance as a change affecting voting.

The Civil Rights Division has attempted to read *Presley* restrictively. Thus, for example, the Division interposed an objection to the reorganization of the bodies controlling the Edwards Aquifer near San Antonio, Texas, asserting that the decision to vest certain functions in a newly created, appointive body essentially stripped the existing, elected body of its power. The State of Texas has challenged the Division's objection in a section 5 declaratory judgment action in the D.D.C.

Moreover, Attorney General Reno, in contrast to her predecessors, has announced her support for a legislative override of the *Presley* decision. Rep. Don Edwards (D-CA) introduced such legislation, but no action was taken in Congress and its current prospects look dim.

II. The Most Pressing Voting Rights Issues Facing the Department of Justice

A. Redistricting and Section Five Enforcement

1. ***Shaw v. Reno***

Although the Civil Rights Division has expressed a renewed commitment to an aggressive, proactive enforcement policy, it is critical to preserve existing gains against a sustained challenge in the wake of *Shaw v. Reno*. In *Shaw*, a bitterly divided Court held that an individual voter "challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."[11] *Shaw* involved a new, "analytically distinct" sort of claim: the white plaintiffs did not claim their ability to participate had been impaired; did not even claim their votes had been diluted; and, as it turned out in the ensuing trial on the merits, did not even seriously contend that their postelectoral representation had been impaired by North Carolina's decision to draw — for the first time since Reconstruction — two congressional districts in which the electorate was majority black. The plaintiffs' central objection was to the decision to take race into account in the redistricting process at all.

Shaw has spawned a deluge of litigation. Already, federal district courts have struck down the creation of new minority-opportunity congressional districts in Texas, Louisiana, and Georgia, while upholding such districts in North Carolina and California. (In fact, the Texas court not only struck down two newly created minority-opportunity districts; it also invalidated a historically black district first represented by Barbara Jordan in 1972!) Litigation is also pending in Florida and Mississippi. The five cases already decided by three judge district courts are all now on appeal to the United States Supreme Court, and one, the Louisiana case, has been accepted for Supreme Court review. Depending on what the Supreme Court decides, there may be an additional round of challenges filed not only to other congressional districts but to state legislative and local apportionment schemes as well.

Defending these minority-opportunity districts poses several difficult questions. First, although states or state officials are the nominal defendants in these lawsuits, they do not always vigorously defend the challenged plans against attack by white voters, particularly when the sole reason they adopted the plan was to comply with a Department of Justice objection under section 5. Second, although with the egregious exception of the Louisiana litigation (where black and white voters were denied intervenor status), citizens who wish to justify minority-opportunity districts have been permitted to intervene as defendants, intervention does not completely solve the problem of lackadaisical or unskilled state defense. Private parties who successfully defend existing districts cannot, unlike section 2 or 5 plaintiffs, recover attorneys' fees or costs; thus, there is a limit to what the civil rights community can finance. Moreover, the private pro-civil rights voting bar is relatively small and is stretched thin already; another half-dozen Shaw lawsuits and it might well reach the breaking point.

Thus, intervention by the Department is critical to the preservation of minority-opportunity districts. So far, the Department has intervened or participated as an *amicus curiae* in all but the California case (which apparently was undetected by any interested group until a jurisdictional statement was filed in the Supreme Court). Unfortunately, at least one district court — in Georgia — has treated the *Shaw* case before it as an opportunity to revisit and criticize the section 5 preclearance process, despite the Voting Rights Act's conferral of exclusive jurisdiction over section 5 matters to the D.D.C. Currently, the Department is considering an appeal strategy in the already decided cases. It has filed its appeals in the Louisiana, Texas, and Georgia cases; the Supreme Court has decided to hear the Louisiana case and the Texas and Georgia cases are still pending.

The Civil Rights Division has created a special Task Force to defend minority-opportunity districts. Particularly if *Shaw* challenges spread to state and local districts, the Task Force's participation will be critical, since many minority citizens will otherwise have no effective representation in the litigation process.

Finally, at a time when legislatures, including Congress, are beginning to become inclusive decision making bodies, some who are opposed to minority districts have escalated their rhetoric in opposition to equal electoral opportunity. They have argued that prohibitions against vote dilution result in racial division and the balkanization of communities by race.

In enacting the 1982 amendments to the Voting Rights Act, Congress rejected these arguments. As Congress stated: "to suggest that it is the results test [of section 2], carefully applied by the courts, which is responsible for ... instances of intensive racial politics, is like saying that it is the doctors thermometer which cause high fever."[12]

The Voting Rights Act does not cause segregative housing patterns or racial bloc voting; what it does is require that where there are such circumstances, districts are not drawn to deny protected classes equal electoral opportunity.

The Administration should devote resources not only to defend minority districts, but also to actively respond to inaccurate rhetoric. The President and Attorney General, as well as the Assistant Attorney General, should be encouraged to make public statements on the importance of the Voting Rights Act and creating minority-opportunity districts.

2. Section 5 Declaratory Judgment Defenses

In light of *Shaw* and the Supreme Court's decision last Term in *Holder v. Hall*, which refused to subject the size of a jurisdiction's governing body to scrutiny under section 2, the number of jurisdictions that can be expected to seek *de novo* review in the D.D.C. of section 5 objections interposed by the Department — or that may bypass administrative preclearance altogether and simply seek judicial preclearance in the first place — should be expected to increase. (Indeed, Texas is already challenging several objections in declaratory judgment proceedings.) Judicial hostility to the goals and methods of the Voting Rights Act means that jurisdictions may decide it is worthwhile to seek preclearance judicially rather than rework their plans to gain Justice Department approval. Thus, in the section 5 context as well as in the *Shaw* constitutional challenge context, the Department is likely to have its resources diverted away from affirmative litigation and toward defense of already undertaken steps. Nevertheless, the Department must vigorously defend such section 5 declaratory judgement actions to ensure full enforcement of the Act.

3. Section 5 Follow-Up Litigation

One emerging problem in voting rights lies in the aftermath of interposed objections and successful section 5 litigation. As a matter of law, covered jurisdictions are forbidden to implement unprecleared or objected-to changes in their voting regulations. Nonetheless, without follow up monitoring from the Department after it interposes a section 5 objection, several jurisdictions have simply continued to use the objected-to practice. Equally problematic, when the objection has related to a proposed apportionment plan, some jurisdictions have simply abandoned the proposed plan and either continued to elect under outdated (and likely unconstitutionally malapportioned) schemes, or have let currently elected officials simply hold over in office.

Similarly, when a jurisdiction fails to seek preclearance of a change in the first place, private citizens (or the Department) can bring a section 5 "coverage" lawsuit in local district court. If the local court concludes that the challenged practice involves a change with respect to voting, it must enjoin the challenged practice until the practice has received administrative preclearance from the Department or judicial preclearance from the D.D.C. Here, too, some jurisdictions continue to use enjoined practices and others simply stand pat even though they are obliged to develop and preclear new practices.

The Department needs to enhance its abilities to follow up on section 5 coverage lawsuits and section 5 objections to ensure both that discriminatory practices are not put into effect and that covered jurisdictions develop and preclear new regulations when old plans are no longer appropriate. One mechanism for doing this is the development of closer liaison relationships with community groups and the civil rights bar; another is simply more efficient data monitoring and follow-up within the Department. For example, the Department might develop practices for checking some specified period after an objection has been lodged (say, 90 days) to see what action the covered jurisdiction has taken. Moreover, the Department needs to put into place follow-up policies for ensuring that jurisdictions from which it seeks submissions actually provide those submissions.

4. Emerging Problems In Redistricting and Section 5 Enforcement

In addition to the issues already discussed, there are some emerging issues under sections 2 and 5 of the Voting Rights Act to which the Department needs to devote some sustained attention. Among these, perhaps the most pressing are how to apply the Act in multi-ethnic communities and the use of citizenship population data.

The paradigmatic jurisdictions before Congress when it passed, extended, and amended the Voting Rights Act were biracial or bi-ethnic — blacks and whites in Deep South communities and Anglos and Latinos in the Southwest. Today, though, the Act is also being used to address questions of political fairness in communities outside the Deep South where three or more ethnic or racial groups are competing for political power. Moreover, in other communities, even groups traditionally seen as a single minority may choose to be divided. For example, Navajos and Hopis in Arizona preferred being placed in different districts.[13] The courts have not yet resolved these issues, and the issue of how to analyze multigroup claims was left unaddressed by the Supreme Court's decision last Term in *Johnson v. DeGrandy*. Nevertheless, especially when it considers preclearance submissions, the Department should (in conjunction with civil rights organizations representing various protected classes) develop some policies on how to resolve such competing claims.

Another emerging issue of particular concern to Latinos, as well as other "language minorities" protected by the Act, is the treatment of citizenship. One of the preconditions for establishing liability under section 2 of the Act, as set forth in *Thornburg v. Gingles*,[14] is that the protected class demonstrate it is sufficiently large and geographically compact to constitute a majority in a single-member district. In many parts of the country a language minority group that is a majority, for example 55% of the total population, will also be a majority of the eligible, voting age population. In other jurisdictions, however, a greater total population percentage, for example, 65%, may be required in a district in order for a language minority group to compensate for lower rates of voter turnout and citizenship.[15]

Defendants have attempted to use this information in two ways. First, they have argued that even if Latinos represent a majority of the total population in a proposed district, unless they also represent a majority of the citizenship voting age population, they cannot meet the "sufficiently large" precondition of *Gingles*. Second, they argue that districts should be constructed based only on citizenship population. The upshot of this would be to require Latino districts to be substantially larger than Anglo districts. The Supreme Court has left the first argument, which was raised in *Johnson v. DeGrandy*, unaddressed. However, to require Latino (or other language minority) plaintiffs to demonstrate that they comprise a majority of the citizenship voting age population in a district to establish liability under section 2, would likely violate the equal protection clause of the Fourteenth Amendment.

Such a requirement places an extraordinary burden uniquely on Latino (and other "language minority") plaintiffs based on an inappropriate race-based presumption. It also makes a single factor — citizenship voting age population — a determinative factor, contrary to section 2's unambiguous "totality of the circumstances" language and the legislative history's clear statement (as well as the Court's, in *Thornburg*) that no single factor is determinative of a section 2 claim. Moreover, it would also likely result in the systematic disparate treatment of such plaintiffs. At the time of redistricting, citizenship population is typically not even available from the Census and consequently, such a citizenship rule would severely prejudice language minorities in the redistricting process.

Constructing districts based on citizenship population also raises additional constitutional concerns. Jurisdictions have *not* traditionally made distinctions between citizens and non-citizens at the time of redistricting. Rather, they have used total population in constructing districts to comply with one-person, one-vote requirements. To now require districts to be created based on citizenship population would result in disproportionately large districts in areas with immigrant populations. It would also impermissibly burden the right of Latinos and language minorities (both citizens and non-citizens) to petition their government and have access to their representatives in violation of their right to equal protection.[16]

It is critical that the Department of Justice oppose the use of citizenship voting age population in redistricting cases involving Latinos as well as other groups with immigrant populations.

B. Bilingual Assistance and Materials

1. Background and Statutory Scheme

There are three basic provisions of the Voting Rights Act that require bilingual assistance: sections 4(e), 4(f)(4), and 203, 42 U.S.C. §§ 1973b(e), 1973b (f)(4), and 1973aa-1a, respectively. Section 4(e), the first of these provisions to be enacted (in 1965), was intended to benefit Puerto Rican citizens who were raised in United States territory, but schooled in a language other than English. As initially enacted, section 4(e) applied to prevent English-only elections from being a barrier to limited-English proficient persons who otherwise were literate at levels equivalent to their English speaking counterparts. Upon the passage of the Voting Rights Act Amendments of 1970, the ban on literacy tests was extended to all states.[17] Consequently, the two provisions were read together to prohibit states "from conditioning the right to vote of persons who attended any number of years of school in Puerto Rico on their ability to read or understand the English language."[18] Under the operative language of the statute, a qualified voter may not be "denied the right to vote in any Federal, state, or local election because of [his/her] inability to read, write, understand, or interpret any matter in the English language." The right to vote under the statute has been interpreted broadly to "encompass the right to an effective vote" and section 4(e) has been held to require "assistance in the language [a voter] can read or understand."[19] Section 4(e) thus provides the

Department with one basis to ensure that persons of Puerto Rican descent are not excluded based on English-only electoral systems.

A number of provisions were added by Congress in 1975 to expand protections to "language minorities" more generally. Based on findings of historical discrimination and its consequential effects, Congress extended the Act's protections to American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage. It did so in three primary ways.

First, Congress expanded the coverage of section 5 of Act, which requires the preclearance of voting changes, to certain new jurisdictions where language minorities resided. Congress also mandated that bilingual elections procedures be required in the newly covered jurisdictions,[20] and "that Federal examiners and observers be able to be designated to serve in those areas." [21]

Second, Congress amended section 2 of the Act to generally prohibit discrimination in voting against language minorities.

Third, in numerous jurisdictions which did not qualify to become covered under section five, Congress nevertheless sought to eliminate the barrier of English-only elections systems by enacting section 203. Section 203 generally applied to a state or political subdivisions if (1) more than 5% of citizens of voting age of such state or political subdivision were members of a single language minority group and (2) the illiteracy rate of such persons as a group was higher than the national illiteracy rate[22]

In 1982, section 203 itself was amended. The so-called Nickles Amendment changed the coverage formula of the 1975 statute. The original provisions covered all jurisdictions where the population was composed of 5% or more of a language minority group. As a result of the Nickles Amendment, coverage was limited to jurisdictions where 5% of the population was composed of "members of a single language minority who did not speak or understand English adequately enough to participate in the electoral process," i.e., who were limited-English proficient. This limited the populations covered under the Act.

After successful coalition efforts, section 203 was once again amended in 1992. Its coverage formula was revised, making up lost ground resulting from the 1982 Nickles Amendment and expanding the geographic coverage of the Act. In addition to jurisdictions covered under the Nickles coverage formula, the 1992 amendments now require jurisdictions to provide bilingual assistance if they have more than 10,000 voting age citizens who are of a single language minority and limited-English proficient. In addition, they also now require that political subdivisions provide bilingual assistance if they contain all or any part of an Indian reservation in which more than 5% of the American Indian or Alaskan Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient.[23]

As a consequence, numerous jurisdictions not previously covered became covered under the Act, including such jurisdictions as Cook County, Illinois; Queens County, New York; and Los Angeles County, California. Thus, the amendments to section 203 provide the promise of ensuring that Latinos, Asians, Native Americans, and Alaska Natives are not denied their right to vote because of language barriers.

> Section 203 requires, similar to § 4(f) 4, that [w]henever any state or political subdivision [subject to the Act] provides any registration or voting notices, forms, instructions, assistance, or other materials of information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.[24]

Currently, all or part of 28 states are covered by either § 4(f)(4) or § 203(c).[25] In jurisdictions not covered by either § 4 (f)(4) or § 203, English-only elections that interfere with the right to vote of protected language minorities may be vulnerable as a violation of section 2 or section 4 of the Act.[26]

2. Department of Justice Efforts

The Department should devote greater resources to ensure English-only election barriers do not deny limited-English proficient citizens their right to vote. A logical starting point is to ensure full compliance with section 203. Working with community groups, the Department has already undertaken successful efforts in New York City to ensure that Chinese language assistance is appropriately provided. Nevertheless, there have been few § 203 cases filed either by the Department or private plaintiffs. Given the recent expansion of the Act's coverage and the importance of language assistance to Asians, Latinos, Native Americans, and Alaskan Natives, a systematic program of enforcement should be undertaken by the Department. The Department should undertake a five part strategy: (1) community education and outreach; (2) outreach to local election officials; (3) a complaint/feedback mechanism; (4) targeted litigation; and (5) revision of the regulations promulgated pursuant to the bilingual provisions of the Act.

First, to inform "language minority" citizens of their rights under § 203 and their right to freely exercise their franchise, the Department should make extensive outreach efforts to community organizations who work with "language minorities" in covered jurisdictions. These efforts should inform such organizations and the public of their right to bilingual assistance and provide a "1-800" number to register any complaints by "language minority" voters. The efforts should also advise such organizations and the public that any tactics employed by individuals or organizations designed to prevent or discourage persons from freely exercising their right to vote are illegal and should be immediately reported.

Second, to maximize the provision of bilingual assistance, the Department should send a letter to covered jurisdictions informing them that they are required to provide bilingual assistance. The Department should set up a liaison person to contact at the Department to obtain standards for compliance. In addition, the Department should ask each jurisdiction to provide a contact person with whom they may work. The local contact would be called on election day if the Department received any complaints through the "1-800" number.

Third, to facilitate the public's ability to report the lack of required language assistance and materials, or the practice of voter intimidation tactics, as noted, a "1-800" number should be made available. Once the Department receives a complaint, it should call the local contact official and attempt to remedy the situation by phone. In egregious circumstances, the Department should seek injunctive relief. A set of model injunction papers should be prepared for use by local U.S. Attorney's offices.

Fourth, based on complaints received, as well as other investigations undertaken by the Department of Justice, in addition to the emergency injunction relief sought, the Department should litigate test cases where necessary to ensure compliance with section § 203 and make clear that noncompliance is unacceptable.

Finally, in addition to facilitating systematic § 203 enforcement, the Department should redress the inadequacy of the regulations promulgated pursuant to the bilingual provisions of the Act. Termed guidelines, some courts have dismissed the regulations as merely suggestive and not "directory," and consequently, have held that they are not fully enforceable.[27] Thus, the regulations should be revised, first and foremost, because of their lack of enforceability. They should also be revised to clarify minimal requirements for bilingual assistance and materials, especially targeting requirements; to reflect changes in the coverage formula of § 203 and the list of covered jurisdictions; and to clarify the requirements for bilingual assistance and materials, as they relate to the requirements of the National Voter Registration Act of 1993.

C. National Voter Registration Act

The National Voter Registration Act of 1993 (NVRA) requires states to effectuate a number of changes designed to increase voter registration nationwide. In passing the Act, Congress made clear that in its view "the right of citizens of the United States to vote is a fundamental right" and that "it is the duty of the Federal, State, and local governments to promote the exercise of that right."[28] Moreover, Congress also wanted to confirm that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities."[29]

Consequently, the NVRA was intended to facilitate both increased and non-discriminatory voter registration. To increase voter registration, the NVRA employs a number of different mechanisms. Among other things, the NVRA requires the use of a simultaneous application for voter registration and for motor vehicle drivers licenses; mail-in registration; and the designation of agencies for the registration of voters in elections for Federal offices, including mandatory use of public assistance offices, state-funded programs primarily engaged in providing services to persons with disabilities, Armed Forces recruitment offices, and additional, designated, discretionary agencies.[30]

To ensure that registration systems are fairly enforced, Congress also provided a number of protections. Contrary to the policy evidenced in the Third Circuit's opinion in *Ortiz v. Philadelphia*, Congress in Section 8 (b)(2) of the NVRA prohibits non-voting purges of persons registered for federal elections.[31] Moreover, section 8(b)(1) of the NVRA requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office ... be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Further, section 7(a)(6)(C) of the NVRA, with respect to designated registration agencies, requires states to "provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own form, unless the applicant refuses such assistance." Finally, section 11(d) of the Act, 42 U.S.C. § 1973gg-9(d), provides "[t]he rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this Act shall supersede, restrict or limit the application of the Voting Rights Act of 1965 (42 U.S.C. § 1973 *et seq.*)." It further provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. § 1973 *et seq.*)."[32] Thus, jurisdictions must comply with section 2, and if covered, with section 5 of the Voting Rights Act, as well as the bilingual provisions of the Act.

The NVRA should result in a substantial increase in the number of registered voters and, hopefully, voter turnout. It may be one of the most significant acts facilitating the right to vote and raises several important issues.

First and foremost is compliance with the NVRA itself. The effective date for the NVRA, in most states, is January 1, 1995. (Some states have received a longer time to comply because state constitutional amendments are required to permit implementing legislation.) Many states have already passed necessary legislation, but a few are resisting the NVRA, either out of sloth and legislative gridlock (perhaps fueled by partisan predictions about the effect the NVRA will have on the composition of the electorate), or on the grounds that the NVRA constitutes an "unfunded mandate" since it may impose obligations on state agencies without federal reimbursement and thereby, assertedly, violates the Tenth Amendment.

Pursuant to section 4(b) of the Act, 42 U.S.C. § 1973gg-2(b), the NVRA applies to all states except: (1) a state in which, under law that was in effect continuously on and after March 11, 1993, there was no voter registration requirement for any voter in the state with respect to an election for Federal office,[33] and (2) a state in which, under law that was in effect continuously on and after March 11, 1993, or that was enacted on or prior to March 11, 1993, and by its terms was to come into effect upon the enactment of the NVRA (so long as that law remains in effect), all voters in the state may register to vote at the polling place at the time of voting in a general election for Federal office.[34]

Two states, Idaho and New Hampshire, passed election day registration legislation subsequent to the March 11, 1993 date specified in the legislation, in an apparent attempt to avoid the requirements of the NVRA, by claiming the legislation is retroactive.[35] The Department should reject this interpretation of the Act and seek to fully enforce the NVRA in these states, if they fail to timely comply.

Under section 13 of the NVRA, states must implement the NVRA on January 1, 1995, unless the state had in effect on May 20, 1993, a provision in its state constitution that would preclude compliance with the NVRA, or unless the state maintained separate Federal and state official lists of eligible voters.[36] In that case, the Act is required to be implemented on the later of (1) January 1, 1996, or (2) the date that is 120 days after the date by which, under the state constitution as in effect on May 20, 1993, it would be legally possible to adopt and place into effect any amendments to the state constitution that are necessary to implement such compliance with the NVRA without requiring a special elections.

As of this writing there are 10 states, in addition to New Hampshire and Idaho, that have neither claimed a state constitutional conflict, nor have enacted NVRA implementing legislation: California, Illinois, Michigan, Mississippi, New Jersey, Pennsylvania, Indiana, Kansas, South Carolina, and New Mexico. Of these, there is indication in Mississippi, Kansas and New Mexico that some attempt at compliance may be made administratively.[37]

In Michigan, New Jersey and South Carolina, legislation has been passed by the respective legislatures of these states, but as of yet, has not been signed by the respective governors. [38] In Indiana, an interim consent decree was entered into. The legislature has until January 31, 1995, to pass its own enabling legislation and some interim measures have been ordered.[39] While enacted, parts of the Louisiana legislation has, as of yet, not been precleared, and for this and for other reasons, will not be implemented in a timely manner.[40]

It is critical that the Attorney General act quickly to seek enforcement of the NVRA. While Section 11(b) of the NVRA provides a private right of action, because of limited private resources, there may be delay in enforcement of the Act. Accordingly, Assistant Attorney General Patrick has announced that the Civil Rights Division will engage in counseling and ultimately litigation to compel state compliance with the NVRA. Moreover, if the NVRA itself is challenged, the Department will no doubt be involved in defending the statute. Finally, once the NVRA is formally implemented, there may nevertheless be substantial enforcement litigation, since the Act requires a variety of registration activities by government agencies that are currently inexperienced with voting rights.

Even where implementing legislation has been enacted, nondiscriminatory compliance must be ensured. Congress was clearly aware of the potential interplay between the NVRA and the Voting Rights Act. As set forth above, § 11(d)(1) of the NVRA provides that its rights and remedies are in addition to those already provided by Voting Rights Act and nothing in the NVRA supersedes, restricts, or limits the Voting Rights Act; § 11(d)(2) provides that nothing in the NVRA authorizes or requires conduct that is prohibited by the Voting Rights Act; and § 8(b)(1) requires roll maintenance activities (i.e., purges) be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965."

The synergism raises several potential questions. All implementing legislation and policy changes — such as, for example, the location of discretionary registration agencies — within jurisdictions subject to section 5 will require preclearance.[41] The Department should be especially vigilant to ensure that discretionary choices do not have a disparate impact on communities of color and language minorities. Purges, discriminatory site selection, use of unusually limited registration hours, the failure to use equally effective procedures in offering voter registration at Department of Motor Vehicle offices and public assistance offices, as well as compliance with the bilingual provisions of the Act related to registration, must be carefully assessed in the section 5 process.

Because delay may result when an objection is interposed under section 5, the Department should generally only object to the specific discriminatory provisions in a state's implementing legislation. Moreover, it should make clear that an objection under section 5 does not obviate the requirements of the NVRA and that the Department will take necessary steps, including litigation, to ensure full and timely compliance with the NVRA. Further, once policies are precleared, the Department must monitor ongoing activities to make sure they are not changed without preclearance.

These same concerns must likewise be reviewed outside the section 5 context. Thus, for example, in jurisdictions subject to the bilingual provisions of sections 4 and 203 of the Voting Rights Act, the Department needs to ensure compliance with the requirements that forms, notices and other related materials be available in languages other than English and that bilingual assistance in completing and complying with the forms is also available. Further, given past experience with voter purges, the Department should develop a plan for monitoring "roll maintenance" under section 8 of the NVRA to ensure that members of racial and language minority groups are not unfairly removed from the rolls.

D. Election Day Monitoring and Enforcement

The Attorney General has authority under 42 U.S.C. §§ 1973(d) and (f) to appoint federal voting examiners and election observers to monitor electors in § 5 jurisdictions, as well as in certain other specific circumstances. That authority should be used in targeted jurisdictions, in much the same way as the § 203 enforcement strategy set forth above. That is, in jurisdictions in which discriminatory voting practices may be problematic, a four part strategy should be used to prevent discrimination with respect to voting: (1) community education and outreach; (2) outreach to local election officials; (3) appointment of federal examiners and observers; and (4) a complaint feedback mechanism.

First, to inform protected classes of their right to freely exercise their franchise, the Department should make extensive outreach efforts to community organizations who work with such protected classes in covered jurisdictions. These efforts should inform such organizations and the public of their right to vote without interference and provide a "1-800" number to register any complaints by voters. The efforts should advise such organizations and the public that any tactics employed by individuals or organizations designed to prevent or discourage persons from freely exercising their right to vote are illegal and should be immediately reported.

Second, the Department should send a letter to targeted, problematic local jurisdictions, informing them that they will be monitoring elections in their jurisdiction. The Department should set up a liaison person and ask each jurisdiction to provide a contact person with whom they may work. The local contact would be called on election day if the Department receive any complaints through the "1-800" number.

Third, federal examiners and observers should be appointed in sufficient numbers to carefully monitor elections and act as deterrents to voter intimidation or discrimination. Their appointment should be appropriately publicized.

Finally, to facilitate the public's ability to report the practice of voter intimidation tactics, as noted, a "1-800" number should be made available. The number should be publicized immediately before each election through local public service announcements. Once the Department receives a complaint (whether from the public or one of its own observers) it should notify the local contact official and attempt to remedy the situation by phone. In egregious circumstances, the Department should seek injunctive relief or otherwise seek enforcement as provided by law. A set of model injunction papers should be prepared for use by local U.S. Attorney's offices.

This strategy should allow for an efficient and effective way to remedy election day discrimination and prevent such discrimination in the future.

Endnotes

[1] The authors would like to acknowledge the assistance of Kenneth Kimerling and Jo-Anne Chasnow. Some of the material herein was previously submitted as testimony or a statement to Congress by members of the Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF). The § 203 and election day monitoring programmatic suggestions were modeled on Latino Election Watch '92 which was undertaken jointly by PRLDEF, the Mexican American Legal Defense and Educational Fund (MALDEF) and the National Association of Latino Elected and Appointed Officials. Some of the arguments regarding citizenship voting age population were developed by PRLDEF and MALDEF in their *amicus* brief in *Johnson v. DeGrandy,* 114 S. Ct. 2647(1994). The views expressed herein are the authors alone.

[2] 118 U.S. 356 (1886).

[3] 113 S. Ct. 2816 (1993).

[4] 114 S. Ct. 2581 (1994).

[5] Civ. Act. No. V-87-16 (S.D. Tex. March 29, 1988), *aff'd,* 490 U.S. 1001 (1989).

[6] 112 S. Ct. 820 (1992).

[7] 861 F. 2d 603 (10th Cir. 1988).

[8] 861 F. 2d 1489 (11th Cir. 1988).

[9] 28 F. 3d 306 (3 d Cir. 1994).

[10] All or parts of the following states are covered by section 5 preclearance requirements: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia.

[11] 113 S. Ct. at 2828.

[12] S. Rep. No. 97-417, 97th Cong., 2d Sess. 34, reprinted in 1982 U.S.C.C.A.N. at 2120.

[13] *See Arizonans for Fair Representation, v. Symington,* 828 F. Supp 684 (D. Ariz. 1992) (three judge court), *aff'd* 113 S.Ct.1573 (1993) (discussing conflict between Navajo and Hopi tribes in Arizona that resulted in their placement in separate congressional districts); *Guy v. Hickel*, A-92-494 Civ. (D. Alaska) (raising question whether Yupiq Eskimos can state a cause of action under § 2 if Eskimos as a whole are fairly represented within the Alaskan legislature).

[14] 478 U.S. 30, 50 (1986).

[15] *See, e.g., Ketchum v. Byrne*, 740 F. 2d 1399 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

[16] *See Garza v. County of Los Angeles*, 918 F. 2d 763, 774 - 776 (9th Cir. 1980), cert. denied, 498 U.S. 1028.

[17] *See* 42 U.S.C. § 1973 aa; *Puerto Rican Organization for Political Action (PROPA) v. Kusper*, 490 F. 2d 575, 579 (7th Cir. 1973).

[18] *PROPA, supra*, 490 F. 2d at 579; *see also Arroyo v. Tucker,* 372 F. Supp. 764, 767 E.D. Pa. 1974); *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D. N.Y. 1974).

[19] *See PROPA, supra*, 490 F. 2d at 580; *see also Arroyo,* 372 F. Supp. at 767, *Torres,* 381 F. Supp. at 312.

[20] See 42 U.S.C. §k 1973 b(f)(4) [Section 4(f)(4)].

[21] Sen. Rep. No. 94-295, 94th Cong., 1st Sess. 32, *reprinted* in 1975 U.S.C.C.A.N. at 798; *see generally, id.*

[22] The 1975 statute provided an exemption for "any political subdivision which ha[d] less than 5% voting age citizens of each language minority which comprised[d] over 5% of the Statewide population of voting age citizens."

[23] The amended statute provides the following exception: "The prohibitions of this subsection do not apply

in any political subdivision that has less than 5 percent voting age limited-English proficient citizens of each language minority which comprises over 5 percent of the statewide limited-English proficient population of voting age citizens, unless the political subdivision is a covered political subdivision independently from its State."

[24] "Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance or other information relating to registration and voting." 42 U.S.C. § 1973 aa-1.

[25] *See* 28 C.F.R. part 55, Appendix (states covered in whole or in part by § 4(f)(4) or § 203(c): Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Wisconsin).

[26] *See Hernandez v. Woodward*, 714 F. Supp. 963 (N.D. Ill. 1989); Section 4e.

[27] *See Montero,* 861 F. 2d at 609; *Delgado*, 861 F. 2d at 1494.

[28] 42 U.S.C. § 1973gg.

[29] *Id.*

[30] Sec. 42 U.S.C. §1973gg-3, §1973gg-4, §1973gg-5.

[31] 42 U.S.C. §1977gg-6(b).

[32] 42 U.S.C. §1973gg-4(d)(2).

[33] This applies to North Dakota.

[34] Three states had election day registration laws enacted on or prior to March 11, 1993 - Minnesota, Wisconsin, and Wyoming.

[35] *See Implementation Watch of the National Voter Registration Act of 1993,* (Human Serve; New York, N.Y.), Oct. 1994.

[36] Three states are claiming such an exemption — Virginia, Vermont, and Arkansas.

[37] *See Implementation Watch, supra* note 12; conversation with Jo-Anne Chasnow of Human Services.

[38] Conversation with Jo-Anne Chasnow.

[39] *Id.*

[40] *Id.*

[41] *See supra* note 10.

Chapter XV

Federal Fair Housing Enforcement: The Clinton Administration at Mid-Term

by John P. Relman

I. Introduction

In its 1993 Report, the Citizens' Commission concluded that federal fair housing enforcement during the final years of the Bush Administration had "stumbled badly."[1] Most of the blame, the Commission observed, lay with the Department of Housing and Urban Development (HUD), whose efforts to enforce the Fair Housing Amendments Act had "all but collapsed under ineffective leadership, poor organization, and mismanagement at both the national and regional level."[2] This mismanagement, the Commission found, had resulted in a "crippling backlog of complaints and an inability to win significant damage awards for victims."[3]

The Commission's Report was somewhat more sanguine about the Housing Section of the Department of Justice, finding that the Department had "continued to make steady, albeit modest, progress" in its efforts to enforce the Act.[4] Nevertheless, the Commission concluded that these enforcement efforts had been hampered by an "inability to prosecute disparate impact cases," insufficient staff and funding to maintain both an aggressive pattern or practice case docket and a growing influx of HUD "election" cases, and opposition from the White House to group home litigation on behalf of the disabled.[5]

Two years into the Clinton Administration, the shackles that stymied enforcement efforts under President Bush have now been removed. Fair housing and fair lending enforcement initiatives have received unprecedented support from the White House, the Attorney General, and the Secretary of HUD, and that support has paid healthy dividends. Both HUD and the Department of Justice have made significant, measurable progress across the board in enforcing the Fair Housing Act.

Critical to the success of these efforts has been the President's personal commitment to make fair housing a priority. That intention became clear early in the term with the signing of a new Executive Order devoted solely to fair housing.[6] The commitment has persisted; during the past year, for example, the President convened a much needed Interagency Task Force on Fair Lending to coordinate federal fair lending enforcement strategy.

At HUD, Secretary Cisneros and Assistant Secretary Roberta Achtenberg have taken sensible and long overdue steps to reorganize HUD's Office of Fair Housing and Equal Opportunity to ensure more efficient and careful complaint processing and investigation. Although it is still too soon to tell just how successful these reforms will be, early signs are encouraging. Reasonable cause findings, as a percentage of total merits determinations made by the agency, have increased by nearly 10%, while administrative closures have dropped by 17%. Median damage recoveries through conciliation have increased modestly, while damage awards by HUD administrative law judges have increased dramatically.

The national backlog of complaints over 100 days old, while greatly reduced from 1992 levels, remains HUD's sore point, increasing in recent months as the agency has focused on training its investigators to act with greater care in reviewing complaints. Efficiency in complaint processing still varies enormously by region, as does the number of successful conciliations and cause findings, but across the nation as a whole HUD is still managing to complete complaint investigations slightly faster than new cases are coming in. Secretary Cisneros and Assistant Secretary Achtenberg, however, cannot reasonably be faulted at this point for failing to eliminate the backlog or bring greater consistency to the regions. HUD's bureaucracy is broad and dense, and the most important elements of the reorganization plan only took effect in October 1994.

Vigorous efforts have been made to investigate and file new Secretary-initiated complaints, increase the level of funding for private fair housing initiatives, and settle protracted public housing discrimination suits filed against the agency. Perhaps most important, HUD finally is in the process of drafting long overdue regulations in the areas of lending and homeowners' insurance discrimination, and has publicly re-affirmed its commitment to the use of disparate impact theory under the Fair Housing Act.

At the Department of Justice, progress has been equally impressive. Over the last two years, the Housing Section has continued to struggle to initiate new pattern or practice suits in the face of a rising tide of HUD election cases. Yet despite record numbers of case referrals from HUD, the Department has moved swiftly to reassert its traditional leadership role in a number of important areas with a series of aggressive initiatives that have had a powerful, beneficial effect on private fair housing enforcement efforts.

In the last year alone, the Housing Section has filed and settled four substantial pattern or practice mortgage lending discrimination cases, culminating in a record-breaking $11 million settlement with Chevy Chase Federal Savings Bank. Expansion of the fair housing testing program has resulted in the filing of 16 new pattern or practice cases, five of which have already generated more than $1 million in compensatory damages. The Department has ended the Bush Administration's "moratorium" on group home litigation, winning group home cases in the Third, Sixth, and Ninth Circuits. The Attorney General, like Secretary Cisneros, has re-affirmed the Department's commitment to apply disparate impact theory under the Fair Housing Act, and the Housing Section has begun to assert disparate impact allegations once again in a growing number of complaints. Although median compensatory damage awards in election cases have generally remained low, monetary awards in pattern or practice cases have increased, and Assistant Attorney General Patrick has committed the Department to seeking larger compensatory and punitive damage recoveries for deserving victims.

Finally, the Attorney General has moved quickly to cope with the growing case docket, reallocating 18 staff positions to the Housing Section and directing the U.S. Attorneys offices across the country to assist with the prosecution of election cases referred by HUD.

The background for all of these developments, including the framework and requirements of the 1988 Fair Housing Amendments Act, is reviewed in the Commission's 1991 and 1993 Reports.[7] The purpose of this chapter is not to repeat that discussion, but rather to update the earlier Reports by providing an assessment of federal fair housing enforcement efforts during the first two years of the Clinton Administration.

The remainder of the chapter is divided into three sections. Part II focuses on HUD's fair housing performance over the last two years on both a national and regional level, analyzing the agency's efforts at reorganization, the timeliness of complaint investigations, case dispositions and cause findings, damage awards, and other significant enforcement efforts.

Part III assesses the Justice Department's performance, reviewing new cases filed, damage awards, and enforcement initiatives in the areas of fair lending, testing, and group home litigation. Conclusions and recommendations are set forth in Part IV.

II. Department of Housing and Urban Development

A. Reorganization Within the Office of Fair Housing and Equal Opportunity and the Office of General Counsel

In an effort to expedite complaint processing, in January 1991 the Office of General Counsel (OGC) relinquished sole authority to make reasonable cause and no-cause determinations. OGC delegated that authority in part to counsel in HUD regional offices, and in part to regional investigators in the Office of Fair Housing and Equal Opportunity (FHEO).[8]

In its 1993 Report, the Commission concluded that this reorganization had resulted in a "highly complex, bifurcated system of review that favors findings of no-cause."[9] The reason for this was that at every level of the complaint evaluation process recommendations of no-cause were generally final, while cause recommendations were automatically subject to further review and referral. Thus, under the 1991 reorganization, investigators in FHEO regional offices could issue a no-cause recommendation that was not subject to review, but could only recommend a finding of cause subject to review and approval of FHEO staff in Washington and regional counsel or OGC. Ultimately, all final probable cause determinations were still made exclusively by counsel.

To rectify the imbalance, in 1992 the process was modified again, this time to require that recommendations of no–cause, just like recommendations of probable cause, be signed by regional counsel, or OGC, in order to become final. This change accomplished little. Regional FHEO staff and regional counsel reported to regional office administrators (RAs) who lacked fair housing expertise. Yet it was the RA's who exercised control over the issuance of cause and no-cause recommendations and determinations by the regional office. The inevitable conflicts between FHEO staff in Washington, OGC, and counsel and FHEO staff in the regional offices resulted in inconsistent interpretations of the Fair Housing Act. Private fair housing organizations around the country reported receiving clearly erroneous no-cause rulings that violated well established fair housing case precedents.

In the spring of 1994, Assistant Secretary Achtenberg won approval for a far more sweeping reorganization designed to eliminate the role of the regional administrators in the cause determination process and give FHEO staff in Washington and in the regions primary responsibility for making cause and no-cause determinations. The plan called for FHEO staff in the regional offices to report directly to the Assistant Secretary, not the regional administrators.[10] On October 1, 1994, the reorganization became effective.[11] As of that date, more than half of the regional administrators retired, making it somewhat easier for FHEO staff in Washington to streamline the chain of command and ensure vigorous and consistent fair housing investigations and enforcement.

Equally important, FHEO, not OGC or regional counsel, is now primarily responsible for making all cause and no-cause determinations. In order for the determination to become final, counsel (either in the regions or at OGC) must still concur in the determination. But the preparation of the cause and no-cause recommendations will now rest solely with FHEO. Conflicts or disagreements at the regional level will be referred to FHEO headquarters and OGC in Washington for resolution, eliminating the bottlenecks created by the involvement of regional administrators.[12]

Until re-training of FHEO field staff has been completed, both cause and no–cause recommendations made in the regional offices will be reviewed by FHEO staff in Washington to ensure consistent application of the law. The plans call for FHEO to solicit the assistance of regional counsel and OGC throughout the investigation to handle legal issues as they arise, but it is clear that the focus of the reorganization has been designed to place FHEO at the center of both the complaint investigation and cause determination process.[13]

It remains to be seen whether these reforms will, in the long run, make complaint processing and investigations more efficient, eliminate the backlog, and reduce inconsistent applications of law and procedure. It is difficult to quarrel with the steps that have been taken; all appear sensible and long overdue. For these efforts alone, Assistant Secretary Achtenberg deserves substantial credit. Ultimately, success will depend upon the rigor, cooperation, and care with which the reorganization is implemented.

B. Complaints Received and Timeliness of Investigations

In its 1993 Report, the Citizens' Commission concluded that HUD's mismanagement at both the national and regional level had resulted in a "crippling backlog of complaints."[14] As discussed in Part II (A) above, since that time FHEO has undergone a major reorganization designed in large measure to address concerns about the backlog. In addition to the reorganization, HUD has taken other steps over the last two years to improve the efficiency of its investigations without sacrificing their integrity. FHEO staff in Washington have focussed on weeding out meritless cases early on, required regional offices to submit plans detailing how they intend to cope with the complaint backlog, and sent high-level staff from Washington to review all complaints that have been pending for more than 100 days.[15]

It is too soon to tell what effect these measures will have on the overall efficiency of complaint investigations. At this point, however, it is clear from the HUD statistics currently available that despite gains made since the end of the 1992 fiscal year, a significant national backlog remains.

In fiscal year 1992, HUD received 6,352 complaints.[16] This represented an 11% increase over the 5,657 complaints received in fiscal year 1991.[17] Under the Fair Housing Act, HUD is expected to complete its investigation of each complaint in 100 days.[18] At the conclusion of fiscal year 1992, HUD had on its docket 2,522 complaints in which it had failed to meet that deadline.[19] This represented a slight improvement from fiscal year 1991. At the conclusion of that year, HUD had failed to meet the 100-day deadline in 3,038 complaints.[20] Thus, while the number of new complaints increased during 1992 by 11%, the number of over-age complaints decreased by 17%.

From 1992 to 1993 the number of new complaints received by HUD declined by nearly 6% to 5,973.[21] In that same fiscal year, HUD substantially reduced the over-age complaints by 60% from 2,522 to 999.[22] The progress made in fiscal year 1993 processing over-age complaints, however, slowed in fiscal year 1994. New complaints received in 1994 declined by 19% from the 5,973 received the previous year to 4,809.[23] At the same time, at the conclusion of fiscal year 1994, the number of complaints in which HUD had failed to meet the 100-day deadline had increased by 46% from 999 to 1,463.[24]

The recent increase in over-age complaints may constitute nothing more than a temporary upswing resulting from the prior Administration's desperate end-of-term efforts to slash the oldest part of the backlog through the expedience of administrative closures and hasty no–cause determinations.[25] This conclusion is supported by the fact that over the last two years the total number of pending complaints (including both over-age and recently filed complaints) has declined slowly yet steadily. In fiscal year 1992, for example, the last year of the Bush Administration, HUD closed 1.05 cases nationally for each complaint received.[26] In 1993, that ratio rose to 1.07.[27] At the end of the first half of fiscal year 1994, the closure to receipt ratio had dipped slightly to 1.03.[28] Thus, even without the full benefit of the reorganization, and with a renewed focus on careful and thorough investigations, HUD is still managing to close slightly more cases than it receives.

C. Case Disposition

1. Cause Determinations

In absolute terms, the number of cause determinations has continued to increase steadily since 1990. In 1991, HUD made cause determinations and issued charges in approximately 150 cases. In fiscal year 1992 the number of cause determinations remained roughly the same (154),[29] but in 1993 cause determinations more than doubled to 323.[30] In the first half of fiscal year 1994, that number showed signs of increasing yet again, reaching 173 at the mid-year mark alone.[31]

Cause findings have also continued to increase as a percentage of total cases in which findings on the merits have been made. During fiscal year 1992, for example, HUD determined that there was no probable cause to believe that discrimination had occurred in 1,327 cases.[32] Cause findings in 1992, therefore, represented a little more than 10% of the total number of cases in which findings were made. By contrast, in 1993 HUD found no probable cause in 1,035 cases;[33] cause findings as a percentage of total findings on the merits rose in that year to more than 24%. In the first half of fiscal year 1994, cause findings as a percentage of total merits determinations jumped to 32.3%.[34]

2. Administrative Closures

Administrative closure is permitted only where complaints are withdrawn, complainants cannot be located, or where HUD lacks jurisdiction.[35] In its 1993 Report, the Commission expressed concern over the fact that HUD had administratively closed a disturbingly high percentage of the total complaints received without providing a public explanation of the reasons for the closures.[36] The fear was that HUD had taken hasty and improper steps to slash the number of over-age cases and reduce the overall backlog.

Over the course of the last two years, however, HUD has begun to document with greater specificity the reasons for those closures. FHEO staff in Washington have issued new standards and criteria for determining when administrative closure is permitted. These guidelines make clear that HUD investigators and conciliators should not attempt to persuade complainants to withdraw a complaint or enter into an "off-the-record" settlement.[37]

As a result of these efforts, the number of administrative closures in recent months has decreased. In fiscal year 1992, for example, HUD administratively closed 2,951 complaints.[38] In 1993, that number increased slightly to 2,997.[39] By the end of the second quarter of the 1994 fiscal year, however, the number of administrative closures had dropped precipitously to 866.[40] Were that rate to hold for the remainder of 1994, HUD would have succeeded in cutting the annual total of administrative closures by nearly 50%.

Equally important, the reduction in administrative closures for the first half of 1994 did not result in an equivalent reduction in the total number of complaints closed by the agency. Rather, administrative closures as a percentage of total closures dropped from 51% for the corresponding period in 1993 to 34% in 1994.[41] This fact is significant, for it suggests that HUD is relying less on the expedient of administrative closures and more on merits determinations and conciliations to reduce its backlog.

3. Conciliations

In its 1993 Report, the Commission expressed concern that while HUD had managed to conciliate successfully approximately 40% of the total number of cases closed annually, the median damage recovery per conciliation was well under $1,000. The Commission noted that these monetary settlements were "shockingly low" given the damage recoveries obtained in federal court and the powerful remedial provisions contained in the Fair Housing Amendments Act.[42]

Recent data indicates that HUD's performance in this area has improved somewhat. While the total number of cases successfully conciliated has not changed significantly, the average amount of monetary compensation obtained per case has increased over the last year. In 1993, HUD successfully conciliated 2,055 cases. This represented a marginal increase from the 1,852 cases conciliated in 1991, but a drop from the 2,065 cases successfully settled in fiscal year 1992.[43] The median damage recovery per successful conciliation in 1993 was $1,102, down slightly from the 1992 median of $1,183.[44] Yet in the first half of fiscal year 1994, the median damage recovery increased sharply to $1,528.[45]

Notwithstanding these improvements, the activities of some of HUD's conciliators have been severely criticized in recent federal court decisions.

In certain regional offices conciliators have failed to make diligent efforts at settlement, while others have insisted that conciliation take place before there has been any investigation of the merits of the case. Both situations make it impossible for the complainant to determine whether or not the settlement represents a just resolution of the case.

Assistant Secretary Achtenberg has pledged to review the conciliation process, initiate new training for conciliators, and issue new guidelines for conciliators to follow in evaluating cases and advising parties.[46] That training and review is urgently required and should not be delayed.

D. Region-by-Region Assessment

Complaint processing, investigations, and conciliations are performed for the most part in HUD's 10 regional offices (now renamed "Fair Housing Enforcement Centers"). Although "no–cause" and "probable cause" recommendations made by the regional offices are subject to review by FHEO and OGC in Washington, successful enforcement of the Fair Housing Act depends in large measure upon the quality and efficiency of the work performed in the regions.

The available statistical data suggests that performance by the regional offices continues to be uneven, with certain regions operating at far greater efficiency and producing far different results on the merits than others.

1. Complaints Received and Timeliness of Investigations

Currently available HUD data does not provide a breakdown of numbers of pending over-age complaints by region. Clearly, this data would be the best indicator of comparative regional office efficiency. Although imperfect as a tool for measuring overall performance, it is possible to obtain some sense of regional office performance by comparing office complaint receipt and closure rates.

Regional office complaint receipt and closure rates are available only for the 1993 fiscal year and the first half of 1994. But focusing on that time period only, it is clear that regional office efficiency varies enormously. Region 1, for example closed 1.63 cases in the first half of 1994 for each complaint received. Likewise, Regions 5 and 6 had positive ratios of 1.34 and 1.32 respectively that resulted in significant reductions of their office backlogs. Region 10, on the other hand, closed only 0.62 cases for each case received. Four other regions, 2, 3, 8, and 9, had ratios ranging from 0.84 to 0.98 that resulted in significant increases in their respective office backlogs.[47]

The trend was roughly similar for fiscal year 1993. In that year Region 1 reported a closure to receipt ratio of 1.31, while Region 10 reported a negative ratio of 0.96. Regions 2, 3, 4, 5, 6, and 7 all reported positive ratios ranging from 1.03 to 1.48, while Regions 8 and 9 reported negative ratios of 0.91 to 0.96.[48]

2. Cause Determinations

Cause findings, measured as a percentage of total determinations on the merits (that is, cause and no-cause decisions added together), also vary enormously by region. From 1991 to 1993, Regions 2, 4, 5, and 9 repeatedly found reasonable cause to believe that discrimination had occurred at significantly higher rates than the other six regions. In 1993, for example, 61% of the merits determinations from Region 2, 30.4% of the merits determinations from Region 5, and between 23 and 24% of the merits determinations from Regions 9 and 4 resulted in cause findings. In that same year, however, Regions 10, 6, 8, and 3 conducted investigations and made recommendations that lead to cause findings in only 6.7%, 8.2%, 8.6%, and 10.2% of their respective total merits determinations.[49]

The data available from the first half of fiscal year 1994 does suggest that the current Administration may be winning improvements in regions with patterns of persistently low cause percentages. Between 1991 and 1993, for example, Region 10 cases resulted in cause determinations at rates ranging between 6.7% and 9% of total merits determinations. In 1994, that number jumped to 46%. Likewise, since 1991 Region 8 cases have resulted in cause findings at rates ranging from 8.6% to 13% of total merits determinations. In 1994, cause findings in that region catapulted to 34% of total merits determinations.[50]

3. Administrative Closures

Regional office use of administrative closings to terminate complaints differs widely. The region-by-region data indicates, however, that regions that receive the most complaints, or which have proved less efficient in processing complaints, are the regions most likely to report cases closed by administrative closure.

For example, Region 9, which managed to close only 0.89 cases for each complaint received in the first half of fiscal year 1994, relied on administrative closures to close 49% of the total number of cases it closed during that time period. In 1993, Region 9 relied on administrative closures to close 51% of the total number of cases closed in that year. Yet Region 9 also received more new complaints (559) than any other region in the first half of fiscal year 1994.[51]

Similarly, Region 3, which managed to close 0.84 cases for each complaint received in the first half of fiscal year 1994, relied on administrative closures to close 71% of the total number of cases closed during that period. Like Region 9, Region 3 also has a history of relying on administrative closures to close a high percentage of cases that it terminates. In 1992 Region 3 relied on administrative closures to close 66% of the complaints that it terminated, and in 1993 it used administrative closures to close 76% of its terminated cases.[52]

The region-by-region statistics also make clear, however, that efficient complaint processing can be achieved without reliance on administrative closures. Administrative closures in Region 1, for example, have historically been the lowest of any region. From 1991 to 1993 administrative closures represented only between 17.8% and 23.2% of the total number of cases closed in Region 1. In the first half of 1994 that percentage dropped to 13%, yet during that same period Region 1 boasted the best complaint closure to receipt rate (1.63 cases closed per complaint received).[53]

Equally important, regions that report low rates of administrative closure do not appear as a result to have sacrificed the time or resources needed to make cause findings. To the contrary, those regions that show the largest recent increase in cause findings as a percentage of total merits determinations have also reported corresponding decreases in the percentage of complaints closed through the use of administrative closures. Regions 8 and 10, for example, which jumped from 8.6% and 6.7% cause rates in 1993 to 34% and 46% respectively in 1994, reported administrative closure rates of 13% and 19% in 1994, down from 20% and 61% respectively in 1993. Region 1, with its historically low administrative closure percentages, reported one of the highest cause percentages (33%) of any region in 1994.[54]

Conversely, in a number of instances the same regions that report persistently high rates of administrative closure report among the lowest rates of cause findings as a percentage of total merits determinations. Since 1992, for example, Region 3's administrative closure rate has never dipped below 66%, making it the highest among the regions. At the same time, Region 3's cause percentage is one of the lowest in the country, hovering in 1992 and 1993 at approximately 10%, and then rising to 26% in the first half of 1994. Likewise, in 1992 and 1993 Region 10 reported administrative closure rates of 53.9% and 61% respectively, while simultaneously registering cause rates of 9% and 6.7%.[55]

All of this suggests that the current Administration is right to scrutinize the activities of regions that report high rates of administrative closure. One important conclusion to be drawn from the regional data is that complaint processing efficiency need not be linked to the use of administrative closures, and those regions that attempt to cut corners by relying too heavily on administrative closures to cope with the backlog may well be the same regions that are not taking the time or care to conduct proper probable cause investigations.

4. Settlements and Conciliations

Successful settlements and conciliations, reported as a percentage of total case closures, reflect some of the same regional differences and trends discussed with respect to cause and administrative closure rates above. As a general matter, regions with the highest rates of successful conciliations tend to be the same regions with higher rates of cause findings and lower rates of administrative closures.

Thus, since 1991 Regions 1 and 5 have reported among the highest settlement success rates of any region (37% to 45% of total closures), while Regions 3 and 10 (the latter in 1992 and 1993 only) have reported among the lowest (20% to 28% of total closures). Two notable exceptions to this trend are Regions 7 and 8, which both have reported traditionally high settlement rates (36% to 50%) while simultaneously reporting among the lowest cause rates.[56] One possible explanation for this result may be the use by conciliators in these two regions of an impending probable cause or no-cause finding to force a settlement.

E. Administrative Hearings

The HUD administrative law judge (ALJ) decisions issued over the course of the last year reflect an important change from earlier cases. Monetary awards in recent cases have escalated sharply, particularly in those cases where ALJs have found respondents liable for race discrimination. Since 1992, median awards in race cases have reached nearly four times the 1990 median awards that were criticized in the Commission's 1993 Report.[57]

In fiscal year 1992, HUD administrative law judges issued decisions in 14 cases.[58] Virtually all of the hearings in these cases were commenced and decided within the statutory time limits required under the Fair Housing Act.[59] Monetary relief awarded in those cases totaled $290,570. Complainants received $207,920, and $82,650 was assessed against respondents in the form of civil penalties.[60] The median compensatory damage award for a complainant in cases alleging racial discrimination was $31,569; the median award in cases alleging discrimination on the basis of handicap was $12,100; and the median award for families-with-children cases was $4,636.[61]

In fiscal year 1993, HUD administrative law judges issued 13 timely decisions.[62] Respondents were found liable in 11 of those cases. Total monetary relief awarded in these cases totalled $278,825, a modest decrease from the 1992 total. $233,900 was awarded to complainants, and $44,925 took the form of civil penalties.[63] The median compensatory damage award in race cases was $20,325; the median award for families-with-children cases dropped to $3,409; the median award for cases involving discrimination on the basis of handicap was $14,400; and one complaint alleging discrimination on the basis of national origin resulted in a $5,000 compensatory damage award.[64]

Monetary damage awards surged dramatically upward in fiscal year 1994, setting new HUD agency records in virtually all areas. Of 16 cases decided, 13 resulted in findings of liability against the respondents.[65] Monetary relief in these cases totalled $852,290, of which $735,790 went to complainants and $116,500 to the government as civil penalties.[66] Median damage awards for race cases increased to $46,890, more than double the 1993 median. Similarly, median awards for families with children cases more than tripled to $11,703; median awards for cases involving discrimination on the basis of handicap doubled to $28,500; and one complaint alleging discrimination on the basis of national origin (as well as race) resulted in a median award of $60,000 to each of three complainants.[67]

Both the HUD administrative law judges and the Secretary of HUD deserve credit for the agency's steady trend in recent years toward a more enlightened approach to compensatory damages. Decisions show a heightened sensitivity toward the injuries suffered by victims of discrimination and greater flexibility in the acceptance and use of various evidentiary techniques to prove intangible compensatory damages.

The tone for this change was set in two 1993 cases, *HUD v. Aylett*[68] and *HUD v. Ocean Sands, Inc.*,[69] in which the Secretary reversed the initial ALJ decisions because the damage awards were too low, and remanded the cases with directions to increase the awards.

Since those decisions the administrative law judges have appeared more willing as a general matter to consider higher damage awards. In one racial harassment case arising out of Vidor, Texas, for example, a HUD ALJ awarded $175,000 and $125,300 to one African American and one white victim respectively.[70] In another race discrimination case in Louisville, Kentucky also involving claims of harassment and intimidation, an administrative law judge awarded $180,000 in compensatory damages to three victims.[71] In a third case involving two disabled complainants, a HUD ALJ awarded a record $83,000 in damages after the complainants were evicted from their apartment because one of the pair suffered from AIDS.[72]

F. Secretary-Initiated Complaints

In its 1993 Report, the Commission criticized HUD for having failed to issue a single cause determination in a Secretary-initiated complaint. The Commission found it "inexcusable" that HUD had not taken advantage of its new enforcement powers to focus resources on underlitigated areas.[73]

At long last HUD appears to have begun to initiate its own pattern and practice complaints. In fiscal year 1993 HUD filed its first three complaints; and in fiscal year 1994 it filed an additional eight systemic complaints.[74] Two of these complaints have been filed against lending institutions, and HUD and the Department of Justice have recently agreed for the first time to collaborate on a joint lending discrimination pattern and practice investigation.[75]

In absolute terms, the total remains disappointing. The new Administration, however, deserves credit for taking a first step in the right direction.

G. Prompt Judicial Action

In those cases where time may be of the essence if meaningful relief is to be preserved for the complainant, the Fair Housing Act expressly authorizes the Department of Justice to seek prompt judicial action at HUD's request.[76] The objective in these cases is to obtain temporary or preliminary injunctive relief to preserve the *status quo* until the investigation of the complaint has been completed.

In its 1993 Report, the Commission noted that HUD's failure to seek prompt judicial action had compromised its ability to obtain housing relief for complainants.[77] As with Secretary-initiated complaints, in absolute terms the number of prompt judicial actions initiated by HUD during the last two years remains disappointingly small. In fiscal year 1992 HUD initiated only four prompt judicial actions; and in 1993 that number increased modestly to eight.[78] Nevertheless, the number of cases where HUD has obtained housing relief through conciliation has continued to climb, peaking at 582 in 1993.[79] This indicates that HUD has begun to take steps to ensure that meaningful relief is preserved for complainants.

H. State and Local Referrals

Complaints received by HUD must be referred to state and local agencies whose fair housing laws have been determined by HUD to be "substantially equivalent" to the Fair Housing Act. The Fair Housing Amendments Act allows HUD to certify a state or local agency only if that agency provides substantive rights, procedures, remedies, and the opportunity for judicial review equivalent to that provided under the Fair Housing Act.[80]

In January 1992 HUD extended the 40-month grace period provided for under the Fair Housing Amendments Act to allow states and localities additional time to enact substantially equivalent fair housing laws. As of the deadline, September 13, 1992, only 15 states and 11 local jurisdictions had been certified.[81]

In its 1993 Report, the Commission expressed concern that the failure to certify so few jurisdictions would force HUD to assume responsibility for processing all complaints originating outside of these few states and localities. The result, the Commission warned, would be the worsening of a case backlog that already threatened to overwhelm the agency.[82]

Recognizing the problem, HUD took steps after the September 1992 deadline expired to create a makeshift mechanism by which it could continue to refer complaints to jurisdictions even though they had not been fully certified. The result was an arrangement that permitted states and localities that had not received full and final certification to enter into an "Interim Referral Agreement" with HUD for a two-year period while HUD monitored the jurisdiction's performance.[83]

This temporary arrangement has not solved the problem, but it clearly has helped avert a potential crisis. Relying on interim agreements, HUD has been able to continue referring substantial numbers of cases to approximately 65 state and local agencies.[84] In fiscal year 1993, for example, HUD referred 4,031 complaints, and in 1994 that number increased to 4,746.[85]

I. The Fair Housing Initiatives Program

Under the Fair Housing Initiatives Program (FHIP), Congress appropriated funds for HUD to make available to private, non-profit fair housing organizations for fair housing testing and enforcement. With limited state funding now available for the private, non-profit fair housing organizations, the FHIP funds have become the only lifeline for many of these organizations.

In 1993, the Commission criticized HUD for "playing politics with applications" for FHIP funds from private fair housing organizations.[86] That practice has now ceased. HUD, and particularly Assistant Secretary Achtenberg, deserve enormous credit for championing record levels of FHIP funding in HUD's appropriations bills for fiscal year 1994 and 1995, and for ensuring that FHIP funds actually reach deserving grantees.

Congress has included $26 million in its appropriations bill for FHIP in fiscal year 1995. This total is nearly $6 million more than the amount Congress appropriated for fiscal year 1994. In fiscal year 1994, HUD awarded 162 FHIP grants for private enforcement, education and outreach, and the creation of 24 new FHIP agencies in areas of the country that have not had private, non-profit fair housing organizations.[87]

From a procedural standpoint, HUD has made important changes to the FHIP application and review process that have permitted multi-year funding for deserving organizations and dramatically reduced the time and money required to complete the review and funding process. An application, review, and funding cycle that used to take 131 weeks to complete has now been cut to 36 weeks.[88]

J. Public Housing Suits

Under the Bush Administration, HUD did little to settle costly, protracted litigation charging HUD with operating segregated and discriminatory public housing. With the arrival of Secretary Cisneros, HUD has taken a new approach in cases where it has been sued under Section 808 of the Fair Housing Act for failing to administer HUD programs in a non-discriminatory manner. The Secretary has directed the General Counsel and HUD assistant secretaries to settle legitimate claims alleging Section 808 violations.[89]

Although budget constraints have made it impossible for the agency to settle all of the meritorious suits pending against it, there has been significant progress. In the last year alone, two protracted and costly cases have been settled in Omaha, Nebraska[90] and Allegheny County, Pennsylvania.[91] The relief agreed to in those cases has provided hundreds of victims of discrimination in public housing with substantial housing relief and assistance, and insured the construction of new, desegregated assisted housing units.

K. Lending and Insurance Discrimination

During the previous two administrations, through its own inaction HUD ceded leadership on the issues of mortgage lending discrimination and homeowners' insurance redlining to the Department of Justice. Over the last two years, however, HUD has taken credible steps to initiate its own enforcement effort and, where possible, collaborate with the Justice Department and the banking regulatory agencies in investigating lending and insurance discrimination complaints.

In addition to the two Secretary-initiated complaints filed against lending institutions,[92] FHEO has created separate lending discrimination "enforcement divisions" within each of the 10 regional offices. Investigators in these divisions are now receiving specialized training in banking and lending practices.[93] FHEO is currently preparing insurance and lending discrimination regulations that will define prohibited practices, describe the evidence required to prove a case, and outline the types of remedies that may be used to redress discriminatory conduct.[94] Equally important, in September 1994 HUD signed a voluntary "Fair Lending-Best Practices" Agreement with the Mortgage Bankers Association designed to encourage member banks to increase loans to low income and minority borrowers.[95]

Of all of these steps, the regulations will likely have the greatest long-term importance. The federal courts have continued to defer to HUD's interpretation of the Fair Housing Act where the language of the statute is ambiguous.[96] What these regulations ultimately say, for example, about such difficult and controversial areas as disparate impact analysis and burdens of proof in lending and insurance discrimination cases will have a profound impact on the development of future federal case law.[97]

L. Use of Disparate Impact Theory

It is well established in discrimination law that a practice or action can be held illegal if it is undertaken with discriminatory intent, or if it has an adverse impact on minority individuals. Nine U.S. Courts of Appeal have held that disparate impact can be used to establish a violation of law under the Fair Housing Act. The Supreme Court has expressly approved the use of disparate impact theory in the employment discrimination area, and the 1991 Civil Rights Act recently affirmed Congressional approval of the practice in employment cases.

The Bush and Reagan Administrations took the position that they were not obligated to proceed with impact cases because the Supreme Court had not expressly ruled on the applicability of disparate impact theory under the Fair Housing Act. This interpretation of the law resulted in countless lost enforcement opportunities and severely weakened HUD and the Justice Department's ability to initiate new pattern or pratice suits.

Last year, for the first time in 12 years, the Secretary of HUD squarely reaffirmed the applicability of disparate impact theory under the Fair Housing Act. In ***HUD v. Mountain Side Mobile Estates Partnership,***[98] the Secretary overturned an initial HUD ALJ decision that misapplied disparate impact case law. In his opinion, the Secretary relied on a traditional disparate impact "business necessity" analysis to find that a three person per unit occupancy limit discriminated unlawfully against families with children.[99] The ***Mountain Side*** decision has set the standard for future HUD litigation. FHEO staff have now received special training in how to use and apply disparate impact analysis in their investigations and cause determinations.[100]

III. The Department of Justice

A. New Cases Filed

Under the Fair Housing Amendments Act, the Department of Justice has authority to bring primarily two types of cases. The Department may, on its own initiative, file cases involving a "pattern or practice" or an issue of "general public importance,"[101] and the Department must file suit on behalf of all complainants who have received a reasonable cause determination from HUD and have elected to prosecute their case in federal court, rather than before a HUD administrative law judge.[102]

In its 1993 Report, the Commission noted that the small number of election cases referred by HUD in the first years of enforcement of the new Act allowed the Department to concentrate on pattern or practice cases. During those years the Department initiated a record number of pattern or practice suits.[103]

The 1993 Report also concluded, however, that the "voluntary" pattern or practice case docket had begun to decrease in late 1991 and 1992 as a consequence of a threefold increase in mandatory election case referrals from HUD.[104] With less time than ever before to devote to its own initiatives and a chronic shortage of Housing Section lawyers and support staff, it was inevitable that pattern or practice filings would suffer.

Through no fault of the Department's this trend has continued, and from the standpoint of pattern or practice cases, has worsened. In calendar year 1993, the Department of Justice filed a record 106 election cases. In that same year, pattern or practice filings dropped to 19, or 15.2% of total cases filed.[105] Through the first three quarters of calendar year 1994, the Department filed 109 election cases, while pattern or practice filings dipped further to 14. As a percentage of total cases filed through the first three quarters of 1994, pattern or practice cases have now bottomed at 11.2%.[106] This percentage, however, must be kept in perspective; pattern or practice filings alone for the first part of 1994 still exceed the total number of fair housing cases filed by the Department in fiscal year 1988, the last year before the new Act became effective.[107]

Families-with-children cases continue to comprise a disproportionate share of the election cases referred by HUD. In 1993, 49% of the election case referrals involved claims of discrimination on the basis of familial status, while only 24% involved claims of racial discrimination.[108] In 1994, 43% of election case referrals alleged familial status discrimination, and 19% involved claims of racial discrimination.[109] With approximately 80% of the Housing Section's staff time now devoted to handling election cases,[110] it has become increasingly more difficult for the Department to address problems of race and national origin discrimination.

To correct this imbalance and permit a renewed focus on its own enforcement initiatives, the Department has taken two steps to increase Housing Section resources and reorganize work assignments. First, early in 1994 the Attorney General began to delegate significant numbers of election cases to United States Attorneys' offices for prosecution. Second, the Attorney General reallocated 18 staff positions from other parts of the Department to the Housing Section.[111]

Whether these administrative adjustments result in increased pattern or practice filings or a renewed focus on race and national origin cases remains to be seen. It is also unclear whether the United States Attorneys, few of whom have ever handled a fair housing case, will be able to work effectively and efficiently with the Housing Section to ensure proper enforcement.

B. Damage Awards

Two years ago the Commission observed that compensatory damage awards obtained by the Justice Department for victims as part of case settlements had improved somewhat, but "still did not compare favorably with results obtained in . . . private fair housing cases."[112] In recent months there has been continued improvement, particularly in pattern or practice settlements, but the average compensatory damage recovery in election cases referred by HUD generally remains low.

In calendar year 1993, for example, the Department won or settled 67 election cases, generating a total of $1,416,802 in compensatory damages for complainants. The median recovery in cases alleging race discrimination was $16,388; in cases alleging familial status discrimination the median was $20,814; and for cases alleging discrimination on the basis of handicap the median recovery was $30,205.[113] Through the first half of calendar year 1994, the Department won or settled 44 cases resulting in a total recovery of $599,770 in compensatory damages. The median recovery for race cases was $9,462; for familial status cases $14,295; and for cases involving claims on the basis of handicap $14,416.[114]

Civil penalties and punitive damages recovered in 1993 and 1994 in election cases totalled only $93,000.[115] Thus, regardless whether damage awards are analyzed in terms of a total monetary recovery per case or compensatory damages, the average recovery per election case for the most part reflects little change from the median recoveries obtained by the Department in the final two years of the Bush Administration.[116] This result is disappointing, for in the last two years damage recoveries in both private fair housing litigation[117] and (as discussed above) in HUD ALJ cases have steadily increased.[118]

Pattern or practice cases, however, have produced more favorable results. In 1993, the Housing Section recovered $2,196,750 in monetary damages from a total of 12 pattern or practice cases. Civil penalties accounted for $267,500 of that total.[119] The median damage recovery for each of the six cases resolved in 1993 involving race claims was $269,250. The median damage recovery for each of the six resolved 1993 cases involving claims of familial status discrimination was $96,875.[120] Through the first half of 1994, five race and national origin cases, including the $11 million Chevy Chase settlement, resulted in $12,115,000 in monetary relief. Of that total, only $35,000 represented civil penalties.[121] Excluding Chevy Chase, the median recovery for each of the four race cases was $247,500. The lone national origin case produced $125,000 in damages.[122]

Although the presence of multiple complainants in pattern or practice cases makes a comparison with median election case recoveries unfair, the size of these median pattern or practice recoveries is still significant, for it offers an indication of the increasing seriousness and aggressiveness with which the Department is investigating and prosecuting the cases it chooses to initiate.

Notwithstanding this improvement in the size of pattern or practice awards and settlements, some private fair housing organizations have raised concerns that the Housing Section has undercut privately represented complainants in joint negotiations in cases where the private party or the Department has intervened in an existing pattern or practice case. Specifically, advocates contend that the Department has offered to settle its part of the case for a sum far less than that sought by private co-plaintiffs.

The usual confidentiality surrounding settlement negotiations makes it difficult to document these allegations. Nevertheless, discussions with private counsel suggest that the prior Administration's approach to damages may have left the Section gun-shy about forcing defendants to pay a significantly higher price for Fair Housing Act violations. Assistant Attorney General Patrick has pledged to address these concerns,[123] but it remains to be seen whether the Housing Section will break with past practices, re-think its approach to damages, and dramatically "up the ante" in its strongest pattern or practice cases.

The issue is important, for record-breaking settlements by the Department necessarily affect the benchmark used by HUD ALJs and federal judges to value claims in both public and private litigation.

C. Enforcement Initiatives and Interpretation of the Fair Housing Amendments Act

In its 1993 Report, the Commission concluded that while the Department had succeeded in vigorously prosecuting "garden variety" disparate treatment cases, "political and policy constraints imposed from above by the Solicitor General, the Attorney General, and the White House ha[d] hampered the Housing Section's ability to enforce the Fair Housing Act."[124]

No such constraints exist now. Despite the rising tide of election cases, Attorney General Reno, Assistant Attorney General Patrick, and the Housing Section deserve credit for moving swiftly to reassert the Department's traditional leadership role in a number of important areas with a series of aggressive enforcement initiatives and revised policy positions. These steps have had a profound, beneficial effect on private fair housing enforcement efforts.

1. Lending Discrimination

In September of 1992 the Justice Department filed and settled its first pattern or practice lending discrimination case. The settlement with Decatur Federal Savings and Loan in Atlanta was heralded at the time not just because it involved the payment of $1 million in damages, but also because it allowed the Department to establish an investigatory and statistical model to follow in prosecuting and proving cases against other lending institutions.[125]

While the Commission praised the result, the 1993 Report also raised questions as to why cases like *Decatur* had been so long in coming, and why the banking regulatory agencies — which have access to bank computer tapes that provide all of the information necessary to determine if an institution is discriminating in violation of the law — were not cooperating with the Justice Department in the investigation of additional pattern or practice cases.[126]

Those questions have, in large measure, now been answered. Although cooperation with some of the regulatory agencies continues to be problematic, Attorney General Reno and Assistant Attorney General Deval Patrick have expanded the lending discrimination program and turned it into one of the Department's most important success stories.

Over the course of the last year alone, the Housing Section has filed and settled four substantial pattern or practice lending cases. In December 1993, the Department settled the first of these cases against Shawmut Mortgage Co. for $960,000 in damages and extensive injunctive relief.[127] An $800,000 settlement followed one month later in a case brought against the First National Bank of Vicksburg, Mississippi in which the Justice Department alleged that the bank charged African-Americans higher interest rates than whites.[128] Shortly after the Vicksburg settlement, the Department won a $125,000 settlement against the Back Pipe State Bank in South Dakota;[129] claims in that case focused on allegations that the bank had refused to make loans to Native Americans where the collateral for the loan was located on a reservation.

Finally, in August 1994 the Department settled the first ever pattern or practice case filed against a major lending institution based solely on claims of "redlining." The case alleged that Chevy Chase Federal Savings Bank had systematically refused to offer its services in African-American neighborhoods and had a corporate policy of placing specific African American sections of Washington, D.C. off-limits for mortgage lending.[130]

The settlement agreed to by the bank was both novel and far-reaching. It required Chevy Chase to pay $11 million to the "redlined" or disinvested neighborhoods affected by the bank's discriminatory practices through three initiatives: a special loan program that provides $7 million to residents of the redlined areas in the form of below market rate home loan financing and grants for down payments; construction of new mortgage offices and bank branches in African American neighborhoods; and affirmative marketing programs designed to encourage qualified minority loan applications and recruit African Americans for bank loan positions.

The importance of the Chevy Chase settlement cannot be overstated. First, in practical terms the case resulted in an infusion of capital, in the form of special financing, into disinvested neighborhoods on a scale never before achieved through bank litigation under the Fair Housing Act. The relief won in Chevy Chase will serve as a benchmark and a model for future cases. Second, it opened the door to an examination of bank marketing practices and established a precedent for future bank investigations based solely on a comparative analysis of bank market shares in African American and white neighborhoods.

Finally, and perhaps most important, the settlement has placed the federal government at the cutting edge of current efforts to combat lending discrimination and provided a powerful boost to private fair housing enforcement efforts. The Justice Department's decision to bring the Chevy Chase case has caused some internal bickering among the bank regulatory agencies and gales of protest from the industry about the legitimacy of the legal theory underlying the litigation; through it all, however, the Department has stood firm, and in the process has emphatically reasserted its leadership role in an important area of civil rights enforcement that has been long ignored.

2. Testing Program

In 1992, the Housing Section developed its own fair housing testing program, using its own employees and testers from private, local fair housing organizations to conduct testing in pattern or practice cases. The first two tester cases were filed in November of that year. At the time it was not clear just how successful this program would prove or how aggressive the Department would be in using its new testing resources.

Over the last two years the Housing Section has worked hard to expand the testing program. Full-time employees have been hired to coordinate tests and hundreds of federal employees have now been trained as testers. The first two cases, both filed in the Detroit metropolitan area, spawned four additional pattern or practice suits in the same area.[131] All told, the Department has now filed 18 pattern or practice cases based on testing evidence generated by its own program. Settlements in five of these cases alone have generated over $1 million in compensatory damages and extensive injunctive relief.[132]

Most important, the testing program has allowed the Department to investigate and prosecute cases in areas of the country where there has been relatively little Fair Housing Act litigation. Testing cases have recently been filed, for example, in Sioux Falls and Rapid City, South Dakota, and Indianapolis, Indiana.[133]

For all of its success, the program is currently suffering from the strain placed on the Housing Section staff's limited resources by HUD election case referrals. Numerous new testing cases apparently have been fully investigated and prepared but cannot be filed because staff are struggling just to handle the litigation demands of the growing election case docket.

3. Use of Disparate Impact Theory

Like Secretary Cisneros, Attorney General Reno has committed the Justice Department firmly and unequivocally to "using all legal theories approved by Congress and the courts to establish violations" of the Fair Housing Act.[134] Over the last year the Department has asserted disparate impact allegations in a growing number of complaints, and recently the appellate section filed a brief on behalf of HUD in the United States Court of Appeals for the Tenth Circuit defending a finding by the Secretary of discrimination against families with children based on a disparate impact analysis.[135]

Although the overwhelming majority of the Housing Section's cases still rely on evidence of discriminatory intent, the Department's reaffirmation of disparate impact theory as a potential basis for liability represents an important and welcome change from the prior Administration. To date, however, with the exception of *Chevy Chase*, the Department's use of disparate impact analysis has generally been confined to traditional refusal to sell or rent cases where the case law on the use of impact theory is clear. It remains to be seen what position the Department will take in more complex areas, such as homeowners' insurance cases, where the courts have yet to decide precisely how — or if — disparate impact analysis should be applied under the Fair Housing Act.[136]

4. Group Home Litigation

One of the most important changes made to the Fair Housing Act in 1988 was the inclusion of the disabled as a protected class. Since that time, in many areas across the country local community bias and discriminatory local zoning ordinances have prevented group homes for the disabled from renting houses in single family neighborhoods. Critical to the success of group home programs is the concept of "normalization," or the ability to find housing in de-institutionalized single family residential communities that allows disabled program participants to become quickly integrated into the mainstream of community life.

Until the final year of the Bush Administration the Department aggressively prosecuted group home cases, with remarkable success. In the fall of 1992, however, in response to political pressure from conservatives, the Department ceased bringing cases on behalf of recovering alcoholics and substance abusers altogether, and in one important appeal in the U.S. Court of Appeals for the Ninth Circuit, *Oxford House v. City of Edmonds*,[137] attempted to drop the appeal and abandon the group home.[138]

With the advent of the Clinton Administration came a reversal in the Department's position on group home litigation. In January, 1993 the Department finally agreed to file an appeal in the Ninth Circuit case, joining private plaintiffs who had been left by the Bush Administration to proceed on their own. Early in 1994 the Ninth Circuit ruled for the Department, and the case is now pending before the Supreme Court.[139] The Justice Department, together with private counsel, will be defending the group home and the favorable Ninth Circuit decision before the Court.

City of Edmonds is not the only group home case where the Department has been active. Over the last two years the Housing Section has returned to its earlier form, winning group home cases in the Third and Sixth Circuits and filing 10 *amicus* briefs in private group home litigation around the country.[140]

The Department's renewed commitment to group home litigation represents a shift of fundamental importance. Many group homes, like Oxford House, provide valuable and needed therapeutic services to recovering alcoholics and substance abusers in financially weakened, drug-infested cities across the country at no expense to the public. Frequently there is no equivalent public program available to make up for the loss of private group home programs.

IV. Conclusion and Recommendations

During the first two years of the Clinton Administration, federal enforcement of the Fair Housing Act has improved markedly across the board. At HUD, Secretary Cisneros and Assistant Secretary Roberta Achtenberg have taken sensible and long-overdue steps to reorganize the Office of Fair Housing and Equal Opportunity. Although it is too soon to tell whether these reforms will improve complaint processing and investigation, early signs are encouraging. Reasonable cause findings are up, administrative closures are down, and progress has been made in reducing the backlog. The Secretary has reaffirmed the agency's commitment to disparate impact theory, pushed for higher damage awards, undertaken to settle long-standing public housing suits filed against the agency, and fought hard for increased funding for private fair housing initiatives.

Likewise, the Justice Department has reasserted its traditional leadership role in a number of important areas. The Housing Section has filed and settled a series of landmark pattern or practice mortgage lending discrimination cases, the moratorium on group home litigation has been lifted, and the Attorney General has reaffirmed the Department's commitment to apply disparate impact theory under the Fair Housing Act. Although a rising tide of HUD election case referrals has jeopardized the initiation of new pattern or practice investigations, the Attorney General has moved quickly to reallocate staff and resources to the Housing Section to cope with the swollen docket. Median damage recoveries in election cases have remained generally low, but the Assistant Attorney General has firmly committed the Department to a policy of seeking larger compensatory and punitive damage recoveries for deserving victims.

Over the course of the last two years, many of the recommendations contained in the Commission's 1993 Report have been implemented. For this, HUD and the Justice Department deserve credit. Much, however, remains to be done. If continued progress is to be made, the following steps should be taken immediately:

The Department of Housing and Urban Development

1. Assistant Secretary Achtenberg should move quickly to review the conciliation process, initiate new training for conciliators, and issue new guidelines for conciliators to follow in evaluating cases and advising parties. The guidelines should require an initial investigation before conciliation begins. Median damage recoveries per successful

conciliation remain far too low given the powerful remedial provisions of the Fair Housing Amendments Act and the large damage awards now being issued by HUD ALJs.

2. Assistant Secretary Achtenberg should continue to audit carefully regional offices that report large numbers of over-age cases, high rates of administrative closure, low rates of successful conciliations, and low numbers of cause findings to determine if these offices have received proper training and are conducting competent investigations. In order to ensure greater consistency and quality of performance among the regions, the Assistant Secretary should move quickly to terminate or transfer personnel, as well as replace leadership, at those regions which continue to report poor complaint receipt to closure rates, high percentages of administrative closures, over–age cases, and low numbers of cause findings.
3. Although there has been some improvement in recent months, the number of Secretary-initiated complaints filed since the passage of the new Act remains far too low. Secretary Cisneros should direct OGC to establish a strike force comprised of its best legal staff to investigate, prepare for litigation, and charge 25 Secretary-initiated complaints before the end of fiscal year 1996.
4. Assistant Secretary Achtenberg should direct FHEO staff in the Washington office to conduct special training in the regions designed to assist investigators in identifying fact situations that may require referrals to the Justice Department for prompt judicial action.
5. To expedite merits determinations in the regions, FHEO staff in Washington should direct all regional investigators to enlist the assistance of local private fair housing organizations wherever possible in conducting fair housing tests as soon as the complaint is filed.
6. Secretary Cisneros should make certain that HUD moves with care in developing regulations on the application of disparate impact theory, discriminatory mortgage lending practices, and homeowners insurance redlining. It is imperative that HUD consult with all sectors of the fair housing community, including the Justice Department, as it crafts the draft regulations.
7. Secretary Cisneros should submit the long overdue annual HUD enforcement reports to Congress for fiscal years 1992 and 1993.

The Department of Justice

1. As the U.S. Attorneys offices around the country assume greater responsibility for prosecuting election cases, the Housing Section should redouble its efforts to identify, investigate, and file pattern or practice cases. Better efforts should be made to identify proper private sector cases that would benefit from Justice Department intervention or *amicus* participation. One or two attorneys within the Section should be designated as the Department contact for private parties or counsel seeking Housing Section assistance or intervention.
2. The Housing Section should monitor carefully the performance of U.S. Attorneys' offices around the country as they begin to litigate fair housing election cases. Mandatory training should be required and provided by attorneys in the Housing Section for all assistant U.S. Attorneys assigned to a fair housing case. Special attention should be paid to methods of proving damages.
3. The Housing Section should institute a formal training course for all line attorneys within the Section that focuses on trial tactics, deposition skills, proving damages, valuing cases, and negotiation techniques. The course should be organized and taught by a panel composed of the Section's most experienced and respected attorneys, supplemented by outside consultants and trial lawyers. A primary purpose of the course would be to increase monetary damage awards obtained in Department cases.
4. Assistant Attorney General Patrick should direct his staff to review all proposed election case settlements specifically to determine whether additional monetary relief should be sought based on the facts of the case and the size of damage awards obtained in recent, similar private sector

or government fair housing cases. In particularly strong pattern or practice cases, the Assistant Attorney General should re-think the Department's past approach to damages and direct the Housing Section to maximize the monetary settlement for deserving victims, even if it risks forcing the case to trial. Record-breaking settlements affect the benchmark used by HUD ALJ's and federal judges to value claims in future cases.

5. The Attorney General should reallocate additional staff and funds to permit the Housing Section to expand its testing program and double the number of pattern or practice testing cases. Specifically, testing should be directed at real estate sales companies that engage in interstate business, and at lending institutions. Alternatively, the Attorney General should seek additional funding from Congress to support the creation of 10 new line attorney positions in the Housing Section devoted solely to pattern or practice litigation. The Department should not be forced to delay the filing of fully prepared and investigated testing cases for lack of legal staff and resources.
6. The Attorney General and the White House should redouble their efforts to ensure that the bank regulatory agencies speak with one voice in support of the Justice Department's lending discrimination enforcement initiatives. Public questioning by agency heads of the Department's legal strategy, like that which occurred after the Chevy Chase settlement, undermines the entire federal enforcement effort.
7. The Justice Department should assist private fair housing groups in testing for lending discrimination by issuing a formal policy statement making clear that testers can apply for loans without violating federal "false statements" laws.

General Recommendations and New Legislation

1. It is unlikely that new civil rights legislation will fare well in the 104th Congress. At the close of the last Congress, however, legislation requiring the insurance industry to meet the same type of disclosure requirements that lending institutions have long been required to satisfy under the Home Mortgage Disclosure Act died before making it to a full vote.[141] Although this legislation did not include all of the requirements sought by fair housing advocates, it did represent an important step forward. The information that would be disclosed under this bill would unquestionably help both the Justice Department and private plaintiffs in investigating and proving a homeowners' insurance redlining case. Remarkably, the legislation that died had the support of the insurance industry. The White House and the Attorney General should move expeditiously at the start of the new Congress to re-introduce this legislation.

Endnotes

[1] Citizens' Commission on Civil Rights, NEW OPPORTUNITIES, p. 92 (1993) (hereinafter referred to as "1993 Commission Report").

[2] *Id.* at 87.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Executive Order 12892 (January 17, 1994). The Order creates a Fair Housing Council, composed of all the heads of federal agencies with responsibility for fair housing enforcement and chaired by the Secretary of HUD, to ensure a coordinated federal fair housing enforcement effort.

[7] *See generally*, 1993 Commission Report; Citizens' Commission on Civil Rights, LOST OPPORTUNITIES, p. 104 (1991); Citizens' Commission on Civil Rights, ONE NATION, INDIVISIBLE: *The Civil Rights Challenge for the 1990's*, p. 268 (1989).

[8] Statement of Roberta Achtenberg, Assistant Secretary, Office of Fair Housing and Equal Opportunity, Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, (September 28, 1994) at 2-4 (hereinafter referred to as "Achtenberg Statement"); *see* also 59 Fed. Reg. 39955; 59 Fed. Reg. 46759.

[9] 1993 Commission Report at 89.

[10] Achtenberg Statement at 2-3. Technically, the organization called for the 10 regional affairs offices to be "eliminated" and replaced with 10 "fair housing enforcement centers." P-H: Fair Housing — Fair Lending Rptr. (Bulletin 10 April 1, 1994) at 1. In pratice, the reorganization means simply that the same regional office personnel will report directly to the Assistant Secretary, not the regional administrator.

[11] Achtenberg Statement at 3; 59 Fed. Reg. 39955.

[12] 59 Fed. Reg. 39955; *id.* at 46759; Achtenberg Statement at 3-4. As with FHED, the reorganization plan called for the agency's 10 regional counsel to be placed directly under the supervision of the Office of the General Counsel in Washington. Previously, regional counsel were supervised by both OGC and the regional administrators. P-H: Fair Housing — Fair Lending Rptr (Bulletin 11 May 1, 1994) at 19. The purpose of this change was to eliminate the role of the regional administrators and thereby streamline the operation of OGC in the same way as was undertaken for FHED.

[13] Achtenberg Statement at 2-4.

[14] 1993 Commission Report at 87.

[15] Achtenberg Statement at 9-11.

[16] Department of Housing and Urban Development, 1992 State of Fair Housing Report (Draft), at 3-3 (copy on file with Washington Lawyers' Committee for Civil Rights) (hereinafter referred to as "Draft 1992 HUD Report").

[17] *Id.*

[18] 42 U.S.C. 3610 (a)(1)(B)(iv).

[19] Draft 1992 HUD Report at 3-5.

[20] *Id.* The number of pending over-age cases reported in the Draft 1992 HUD Report appears to be inconsistent with the number of pending over-age cases reported in an earlier report. In its 1991 Report (The State of Fair Housing 1991), HUD reported 1,432 over-age cases pending at the close of calendar year 1991. If this number is used, the number of over-age complaints actually increased from 1991 to 1992 by a percentage as high

as 76%. It is unlikely that HUD closed 1,606 over-age cases (the difference between 3,038 and 1,432) in the three month period between the end of fiscal year 1991 (September 30) and the end of calendar year 1991 (December 31). One of these numbers, therefore, may well be erroneous.

[21] Department of Housing and Urban Development, "The FHEO Quarterly Trend Analysis, (FY 1993, Year End)" at 1 (on file with the Washington Lawyers' Committee for Civil Rights) (hereinafter referred to as "FHEO Trend Analysis 1993").

[22] Data supplied by the Department of Housing and Urban Development upon request (on file with the Washington Lawyers' Committee for Civil Rights) (hereinafter referred to as "HUD Data").

[23] *Id.*

[24] *Id.*

[25] *See* 1993 Commission Report at 87–88.

[26] FHEO Trend Analysis 1993 at 1, 4.

[27] *Id.*

[28] Department of Housing and Urban Development, "Title VIII Quarterly Trend Report, (FY 1994 2nd Quarter)" at 2 (on file with the Washington Lawyers' Committee for Civil Rights) (hereinafter referred to as "1994 Quarterly Report").

[29] Draft 1992 HUD Report at 3–8. One data source provided by HUD provides a different number for total charges issued in fiscal year 1992. See FHEO Trend Analysis 1993 at 5 (crediting HUD with 186 cause determinations).

[30] FHEO Trend Analysis 1993 at 5.

[31] 1994 Quarterly Report at 8.

[32] Draft 1992 HUD Report at 3–8. A different data source credits HUD 1,321 no cause determinations for the same time period. See FHEO Trend Analysis 1993 at 5.

[33] FHEO Trend Analysis 1993 at 5.

[34] 1994 Quarterly Report at 8.

[35] Department of Housing and Urban Development, STATE OF FAIR HOUSING (1991) at 7; Draft 1992 HUD Report at 3–6.

[36] 1993 Report at 87–88.

[37] Achtenberg Statement at 5–6.

[38] FHEO Trend Analysis 1993 at 5.

[39] *Id.*

[40] 1994 Quarterly Report at 8.

[41] *Id.*

[42] 1993 Commission Report at 88.

[43] Draft 1992 Report at 3–7; FHEO Trend Analysis 1993 at 5.

[44] Draft 1992 Report at 3–7; HUD Data.

[45] HUD Data.

[46] Achtenberg Statement at 6.

[47] 1994 Quarterly Report at 14, 18, 24.

[48] FHEO Trend Analysis at 7, 11.

[49] HUD Data; FHEO Trend Analysis at 12.

[50] HUD Data; FHEO Trend Analysis at 12; 1994 Quarterly Report at 19.

[51] FHEO Trend Analysis at 12; 1994 Quarterly Report at 14, 18, 19, 24. Region 6, which reported the second highest total of new complaints for the first half of fiscal year 1994 (468), relied on administrative closures to terminate more than one–third of the complaints it closed during that six–month period. Yet Region 6 did report

a positive complaint closure to receipt rate for that same time period of 1.32.

[52] HUD Data; FHEO Trend Analysis at 12; 1994 Quarterly Report at 14, 18, 19, 24.

[53] *Id.*

[54] FHEO Trend Analysis at 12; 1994 Quarterly Report at 19.

[55] HUD Data; FHEO Trend Analysis at 12; 1994 Quarterly Report at 19.

[56] *Id.*

[57] *See* 1993 Commission Report at 88 and text accompanying notes 58–70 below.

[58] Draft 1992 HUD Report at 4–5.

[59] *Id.* at 4–7. The Fair Housing Act requires that hearings begin within 120 days after the issuance of a charge. In addition, the administrative law judge is required to issue an opinion within 60 days after the conclusion of the hearing. 42 U.S.C. 3612 (g)(1), (2). In three of the case decisions reported in fiscal year 1992, hearings began slightly beyond the 120–day deadline due to last minute, unsuccessful settlement efforts. Draft 1992 HUD Report at 4–7.

[60] *Id.* at 4–5.

[61] *Id.* (numeric calculations made by author). As calculated here, the median damage recoveries represent the median damage amount obtained per complainant, not per case.

[62] *See* Schwemm, R., Housing Discrimination (1994 ed.) at Appendix E (listing outcomes of all HUD ALJ decisions by type of case, number of victims, and amount and type of relief). For purposes of this analysis, the cases defined to fall within fiscal year 1993 include all decisions listed in Appendix E beginning with *HUD v. Paradise Gardens*, P–H: Fair Housing — Fair Lending Rptr. 25,037 and ending with *HUD v. Ocean Sands, Inc.*, P–H: Fair Housing — Fair Lending Rptr. 25,055.

[63] *Id.* (numeric calculations made by author).

[64] *Id.* (numeric calculations made by author). Cases alleging more than one ground as reason for discrimination, e.g. race and familial status, were included in calculating the median damage award for both types of cases.

[65] *Id.* & 1995 Supp. (in draft from Professor Schwemm, on file with Washington Lawyers' Committee for Civil Rights). For purposes of this analysis, the cases defined to fall within fiscal year 1994 include all decisions listed in Appendix E beginning with *HUD v. Jancik*, P–H: Fair Housing — Fair Lending Rptr. 25,058 and ending with *HUD v. Pfaff*, P–H: Fair Housing — Fair Lending Rptr. 25,07–.

[66] *Id.* (numeric calculations made by author).

[67] *Id.* (numeric calculations made by author). Cases alleging more than one ground as reason for discrimination, e.g. race and familial status, were included in calculating the median damage award for both types of cases.

[68] P–H: Fair Housing — Fair Lending Rptr. 25,062; 25,067 (HUD Secretary 1993, 1994).

[69] P–H: Fair Housing — Fair Lending Rptr. 25,056 (HUD Secretary 1993).

[70] *HUD v. Johnson*, P–H: Fair Housing — Fair Lending Rptr. 25,076 (HUD ALJ 1994).

[71] *HUD v. Simpson*, P–H: Fair Housing — Fair Lending Rptr. 25,07– (HUD ALJ 1994).

[72] *HUD v. Burns Trust*, P–H: Fair Housing — Fair Lending Rptr. 25,073 (HUD ALJ 1994).

[73] 1993 Commission Report at 88–89.

[74] HUD Data.

[75] Achtenberg Statement at 5.

[76] 42 U.S.C. 3610 (e).

[77] 1993 Commission Report at 89.

[78] HUD Data.

[79] *Id.*

[80] 42 U.S.C. 3610 (f)(3)(A).

[81] *See* 1993 Commission Report at n.33.

[82] *Id.* at 89.

[83] *See* Relman, J., Housing Discrimination Practice Manual, p. 3–3, n.1 and Appendix 3B (1994 ed.) (discussing background of decision to use interim agreements and listing states and localities with interim agreements as of October 18, 1993).

[84] Achtenberg Statement at 17.

[85] HUD Data.

[86] 1993 Commission Report at 90.

[87] Achtenberg Statement at 22, 25.

[88] *Id.* at 21–22.

[89] *Id.* at 40–44.

[90] *Hawkins v. Cisneros*, C.A. No. 90–0–55 (D. Neb. 1994).

[91] *Sanders v. HUD*, C.A. No. 88–1261 (W.D. Pa. 1994).

[92] Achtenberg Statement at 5.

[93] *Id.* at 24.

[94] *Id.* at 26, 31. On April 15, 1994, the Interagency Task Force on Fair Lending, a task force consisting of representatives from the 10 major federal agencies responsible for fair lending enforcement, issued a general policy statement designed to clarify the basic principles the federal government intends to use in identifying lending discrimination. 59 Fed. Reg. 18266. The Statement is important, for it represents the first step toward the development of comprehensive fair lending regulations. On August 16, 1994, HUD issued an advance notice of proposed rulemaking on "[d]iscrimination in [p]roperty [i]nsurance [u]nder the Fair Housing Act." 59 Fed. Reg. 41995. Public hearings were held throughout the Fall of 1994 to solicit public comment. Achtenberg Statement at 31.

[95] Mortgage Bankers Association of America and the U.S. Department of Housing and Urban Development, *Fair Lending — Best Practices Master Agreement* (September 14, 1994).

[96] *See, e.g., NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992) (deferring to HUD's interpretation of Fair Housing Act to conclude that Act covers discriminatory redlining by insurance companies).

[97] It is clear that Assistant Secretary Achtenberg understands the critical role that regulations play in the development of case law, for HUD has been pushing ahead in recent months to develop regulations in areas other than lending and insurance. On July 7, 1994, for example, HUD issued a proposed rule defining for the first time important aspects of the Fair Housing Act's Section 807 exemption for "housing for older persons." Specifically, the rule defines precisely what "significant services and facilities" for older persons must be offered by a housing provider in order to have the dwelling complex qualify as housing for the elderly. See 59 Fed. Reg. 34902. Likewise, conversations with FHEO staff suggest that HUD may soon issue a notice of proposed rulemaking on the topic of disparate impact theory and its application to the Fair Housing Act.

[98] P–H: Fair Housing — Fair Lending Rptr. 25,064 (HUD Secretary 1993).

[99] *Id.* at 25,617–19. The Secretary applied the same "business necessity" analysis used by the U.S. Court of Appeals for the Fourth Circuit in *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984).

[100] Achtenberg Statement at 8.

[101] 42 U.S.C. 3614(a).

[102] 42 U.S.C. 3612(o).

[103] 1993 Commission Report at 90.

[104] *Id.*

[105] Department of Justice Fair Housing Act Case Docket and supplementary data, supplied by the Department of Justice upon request (on file with Washington Lawyers' Committee for Civil Rights) (hereinafter referred to as "DOJ Case Docket").

[106] *Id.*

[107] *See* Statement of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, (September 28, 1994) at 3 (hereinafter referred to as "Patrick Statement") (noting that in fiscal year 1988 the Department of Justice filed only 13 pattern or practice fair housing lawsuits).

[108] DOJ Case Docket.

[109] *Id.*

[110] Patrick Statement at 4.

[111] *Id.* at 5; P–H: Fair Housing — FAIR LENDING RPTR. Bulletin 6, December 1, 1993, "Attorney General Reno Announces Major Expansion of DOJ's Housing Section," at 1. It is important to note that the 18 staff positions that were reallocated to the Housing Section have not resulted in the addition of 18 new attorneys to the Section. Many of the positions have been designated for paralegals or other non–attorneys. This allocation does not appear to have significantly helped the Section improve its ability to file new pattern or practice cases. Discussions with Justice Department officials indicate that despite the addition of these new positions the Section still lacks sufficient attorneys to maintain the election case docket and simultaneously expand the number of new pattern or practice cases.

[112] 1993 Commission Report at 91.

[113] DOJ Case Docket (numeric calculations made by author). As calculated here, the median damage recoveries represent the median damage amount obtained per case, not per victim. Most election cases, however, involve a single victim. The median damage calculations include monetary damages obtained through both judgments and settlements.

[114] *Id.*

[115] *Id.*

[116] 1993 Commission Report at 91(noting that compensatory awards during those two years ranged from $5,000 to $20,000). This statement, of course, does not hold true for 1993 damage recoveries in cases involving claims of discrimination on the basis of handicap. In those cases the median recovery well exceeded $20,000. See text accompanying this note, supra.

[117] *See, e.g., Fenwick-Schaefer v. Winchester Homes,* No. 90066002/CL11092 (Md. Cir. Ct. Dec. 13, 1993)($2,015,000 punitive and compensatory damage award to individual plaintiff and fair housing organization); *Simms v. First Gibraltar Bank*, No. H-91-3367 (S.D. Tex. Feb. 11, 1994) ($3,210,000 compensatory and punitive damage award to white plaintiff denied loan due to racial composition of building).

[118] *See* nn. 60–72 supra and accompanying text.

[119] DOJ Case Docket (numeric calculations made by author).

[120] *Id.* As with the election case calculations, the median damage recoveries in pattern or practice cases as calculated here represent the median damage amount obtained per case, not per victim.

[121] DOJ Case Docket (numeric calculations made by author).

[122] *Id.* The national origin case involved claims of lending discrimination against Native Americans by a South Dakota bank. *United States v. Black Pipe State Bank*, C.A. No. 93–5115 (D.S.D. 1994).

[123] *See* Patrick Statement at 15–17 (emphasizing importance of maximizing damage awards). This position has been re–iterated by Justice Department officials in conversations with the author.

[124] 1993 Commission Report at 91.

[125] *United States v. Decatur Federal Savings and Loan Association*, C.A. No. 1 92– CV–2198 (N.D. Ga. 1992).

[126] 1993 Commission Report at 92.

[127] *United States v. Shawmut Mortgage Co.*, C.A. No. 3:93 CV 2453(AVC) (D. Conn. 1993).

[128] *United States v. First National Bank of Vicksburg, C.A. No. 5:94CV6(B)(N)* (S.D. Miss. 1994).

[129] *See* n. 122 *supra*.

[130] *United States v. Chevy Chase Federal Savings Bank and B.F. Saul Mortgage Company*, C.A. No. 94-1824-JG (D.D.C. 1994).

[131] *See* 1993 Commission Report at n. 62 (citing first two Detroit testing cases, *United States v. Curcura*, No. 92 CV 75867 (E.D. Mich. 1993) ($267,000 settlement); *United States v. Grillo,* No. 92 CV 75869 ($350,000 settlement); Patrick Statement at 6 (commenting on later four cases: *United States v. Megapolis* ($150,000 settlement); *United States v. Hartfiel* ($45,000 settlement); *United States v. King's Pointe* ($425,000 settlement); *United States v. Charalambopoutos* ($8,000 settlement).

[132] Patrick Statement at 6.

[133] *Id.*

[134] *Id.* at 14 (quoting from speech of Attorney General at HUD's National Fair Housing Summit in January, 1994, in which the Attorney General stated:

"Today's discrimination is subtle and I believe at times not even conscious. Housing providers and lenders, as well as victims themselves, often believe that racial animus or deliberate premeditated acts of discrimination must be present to violate the law. This is not so. You can call it bad service, indifference or even thoughtlessness, but when the consequences cause disproportionate harm to those protected by the law it is discrimination. I believe that all alleged violations of the law must be supported by sound factual evidence. But our Department is committed to using all legal theories approved by Congress and the courts to establish violations that we believe exist.").

[135] *HUD v. Mountain Side Mobile Estates Partnership* (cited at nn. 98, 99 *supra*).

[136] *See NAACP v. American Family Mutual Ins. Co.,* 978 F.2d 287, 290 (7th Cir. 1992) (noting in dictum that disparate impact theory may not be available in homeowners' insurance redlining case brought under Fair Housing Act).

[137] 18 F.3d 802 (9th Cir. 1994).

[138] 1993 Citizens Commission Report at 91–92.

[139] 63 U.S.L.W. 3346 (Nov. 1, 1994).

[140] *United States v. City of Philadelphia*, 838 F.Supp. 223 (E.D. Pa. 1993), *aff'd*, Nos. 93–2095 & 93–2096 (3rd Cir. June 10, 1994); *United States v. City of Taylor,* 13 F.3d 920 (6th Cir. 1990); Patrick Statement at 11, 18.

[141] H.R. 1188, 103d Cong., 2d Sess. ("Anti Redlining in Insurance Disclosure Act").

Chapter XVI

Immigrants and Public Services: Some Principles for Reform

by Wendy Zimmermann[1]

I. Introduction

In recent years there has been considerable debate over the issue of immigration, much of it focusing on the costs and benefits of immigrants. This debate has led to two types of proposals related to the broader question of who is responsible for immigrants' costs. First, several states have sued the federal government, demanding reimbursement for the costs of providing services to legal and illegal immigrants. Second, legislation has been proposed at the federal and state levels to restrict immigrant eligibility for public services. These proposals have been made, however, with little systematic consideration of the broad, important questions raised by these issues.

Focusing on the issue of immigrant eligibility for services, this paper will (1) explore trends in recent immigration and in funding for immigrants; (2) outline the principles that inform our rules governing immigrant eligibility for benefits; (3) examine the extent to which current proposals to reform immigrant eligibility for benefits are in line with these principles. In so doing, this paper will inform the following broad questions:

- Who is responsible for immigrants? What is the role of the federal, state, and local government, of the immigrant's family or sponsor in supporting the immigrant?
- When is the government justified in withholding certain benefits from one group while granting them to another?
- What are the implications of our eligibility rules for immigrants' membership in and integration into society?

II. Policy Context

A number of recent trends help explain the prominence of the immigration issue and provide a useful context for exploring the question of immigrant access to services. Immigration to the United States has been growing in recent years, yet the amount of federal money targeted at newcomer populations has declined. This trend has shifted much of the responsibility for providing services to immigrants to state and local governments. At the same time, more immigrants are entering who are poor and certain groups of immigrants are increasingly likely to use public assistance. Thus, proposals to restrict immigrants' access to services are coming at a time when funds aimed at providing them services or offsetting their costs are declining and when their need for services appears to be increasing.

Increasing Immigration

The 1990 Census counted 19.7 million foreign-born people in the United States, up 34 percent from 1980. Nearly 10 million of the foreign-born entered during the 1980s, more than had entered in any previous decade.

The foreign-born population includes not only legal immigrants, but also naturalized citizens, refugees, temporary immigrants, and undocumented immigrants. About 6.5 million, or one-third of the foreign-born, are naturalized citizens who are, of course, eligible for public services on the same basis as native-born citizens. About 2.5 million, or 15% of those counted in the Census, are undocumented immigrants who are ineligible for most public benefits. (As of October 1994, the undocumented immigrant population is estimated at close to 4 million and it is growing by about 300,000 people annually.)[2] Most of the remaining foreign-born are legal immigrants or refugees, who are broadly eligible for most public services. A relatively small number are temporary immigrants such as students or businessmen who are not eligible for most public services.[3]

Declining Funds for Immigrants

As the number of immigrants entering the country continues to climb, the amount of money that the federal government dedicates to providing services to newcomers, or to offsetting their costs, has declined. The clearest example of this trend is the decline in funding for the Refugee Program under which refugees receive cash and medical assistance as well as employment and language training. Between 1982 and 1992 funding per refugee declined in real dollars by 70%. Further, the period during which refugees may receive special cash and medical assistance was cut from 36 months in 1980 to 8 months as of 1991. This shift has meant that refugees must increasingly rely on mainstream assistance programs such as Supplemental Security Income (SSI) and state General Assistance (GA) programs. At the same time, the one-time impact assistance grants to offset state and local costs of providing services to the population that legalized under the Immigration Reform and Control Act of 1986 (IRCA) are due to expire at the end of fiscal year 1995.[4]

In 1994, however, the federal government has signaled some willingness to maintain funding for the Refugee Program and to help offset certain state and local costs attributable to immigration. In its budget for FY 1995 Congress approved level funding for the Refugee Program ($400 million), despite slightly declining projected refugee admissions. The 1994 Crime bill authorizes $1.8 billion over six years in federal reimbursement to states for the costs of incarcerating undocumented immigrants.[5] Despite these recent signals, federal funds per refugee remain substantially lower than during the early 1980s and though the crime bill funds will offset some state costs, they will not be used to provide services to newcomers.

Growing Need for Services

While funding for immigrants has declined over the past decade, immigrants and refugees' need for certain public services has grown. The growth in the number of immigrants living in poverty provides perhaps the best measure of this need. During the 1980s the number of immigrant households in poverty grew by 42% while the number of native households in poverty grew by 11%.[6] The share of immigrants living in concentrated poverty areas, neighborhoods where at least 40% of the population is poor, also grew dramatically over the decade, from 1.5 to 5.3%.[7]

Changes in the composition of the refugee population have also resulted in a growing need for services. Refugees arriving in the late 1980s and early 1990s had less education and greater need for health services than those who arrived earlier. This latter change is partly attributable to the growth in the share of refugees from the former Soviet Union, from 1% in 1984 to 46% in 1992. Many of the Soviet refugees are older and less healthy than other refugees.

Participation in public assistance programs provides another measure of need on the part of the immigrant population. Overall, the foreign-born are only slightly more likely than the native-born to receive public assistance, generally because they are poorer. However, closer examination of the data reveals that immigrant public assistance use is concentrated among two groups: refugees, who are particularly needy and who are explicitly eligible for benefits after arrival, and recent elderly immigrants. Recent elderly immigrants participate in SSI, a cash assistance program for the blind, elderly, and disabled, partly because they arrived too late to contribute to and therefore receive benefits from the social security system.[8] Young non-refugee immigrants are less likely than natives to use public assistance.

Use of certain public assistance programs by specific populations has grown over the past decade. The share of SSI recipients who are immigrants grew from about 3% in 1982 to close to 12% in 1993, greater than the growth in the total immigrant population. More than 60% of immigrant SSI recipients are elderly (the remainder are blind or disabled) and three-quarters are legal immigrants while most of the rest are refugees.[9]

Census data reveal that though the share of immigrant households receiving public assistance grew by more than 10% between 1980 and 1990, the share of individuals receiving public assistance remained about the same.[10]

Concentrated Effects of Immigration

The settlement pattern of immigrants as well as the way in which their costs are distributed among the various levels of government concentrate the effects of immigration in a handful of places. About three-quarters of immigrants who entered in the 1980s live in only six states: California, New York, Texas, Florida, New Jersey, and Illinois. California alone receives about 4 out of 10 new immigrants, partly accounting for the heightened attention to immigration there. The undocumented immigrant population is even more concentrated — 85 percent live in those same states. Further, research on the costs of immigration shows that while immigrants are a net fiscal gain to the federal government, their effects vary at the state level and are likely to result in a net burden at the local level.[11]

III. Principles that Inform Immigrant Eligibility Rules

The rules governing immigrant eligibility for public services are currently laid out in a wide range of immigration and welfare laws, in regulations and in court decisions. Federal policymakers have not systematically outlined eligibility by immigrant category and type of public benefit. Rather, these rules have been developed since the 1970s in an ad-hoc fashion.[12] Generally, Congress made restrictions as part of an effort to reduce costs or to reduce illegal immigration. Some of the first restrictions on immigrant eligibility were made in response to rising rates of immigrant participation in SSI, the same issue that has contributed to current reform efforts. Changes in eligibility rules have also been made as a result of political compromise, for administrative feasibility, or in response to the creation of new immigration statuses.

This ad-hoc development of immigrant eligibility has resulted in rules that are often quite complex, with many different eligibility rules for different groups of immigrants. Another result of the way in which rules have been created is that Congress has not clearly articulated the reasons why certain categories of immigrants have been made eligible for certain types of services. This lack of articulation means that the principles that drive our eligibility rules are implicit, and therefore may be more fragile than if they were explicit. This fragility may also help explain the current spate of proposals to restrict immigrant access to public services.

Selected Principles

Despite the ad-hoc development of immigrant eligibility rules, certain principles have fairly consistently shaped those rules. While the following list is not exhaustive, it includes some of the most important principles that have informed the distinctions we draw among different types of immigrants and different types of services.

The first and broadest principle provides legal immigrants with generally the same eligibility for services as citizens. It makes undocumented immigrants generally ineligible for most public services, including Aid to Families with Dependent Children (AFDC), Medicaid, food stamps, SSI, and Unemployment Compensation

Second, legal immigrants residing permanently in the United States, or with an opportunity to reside permanently, are generally eligible for most types of benefits while temporary immigrants, such as those who enter on a student, business, or visitor visa, are ineligible. The Immigration Act of 1990 granted temporary protected status (TPS), or safe haven, to certain nationality groups living in the United States (Salvadorans, for example) because circumstances in their home country made return dangerous. The Act also explicitly barred those granted TPS from receiving most types of benefits. A third group of temporary immigrants, the population that legalized its status under IRCA, was also barred from receiving most federal benefits for five years, in part because for some of that time they were in a transitional temporary status.

A third principle driving our eligibility rules is humanitarianism. We admit refugees and asylees to the United States for humanitarian reasons, because they are fleeing political persecution. Similarly, we provide these groups with special benefits for humanitarian reasons — because their experience as refugees makes them especially needy. Refugees who qualify for AFDC and Medicaid may enroll in those programs upon arrival. Those who are needy but do not qualify for AFDC or Medicaid (because they do not meet family composition requirements, for example) are eligible for special cash and medical assistance for eight months. Through the Refugee Program, they may also receive English language training and a broad array of employment services. Though refugees continue to receive special services for humanitarian reasons, the Refugee Program, in the face of declining funding, has shifted its emphasis from providing training and education prior to employment to promoting early employment. This shift is similar to the current trend in welfare reform to make benefits transitional and encourage recipients to work in exchange for benefits. It is also interesting to note that though TPS was granted to some immigrants for humanitarian reasons, their temporary status meant that they do not get the same humanitarian benefits as refugees.

Fourth, legal immigrant eligibility for benefits is guided by the principle of family responsibility. Though legal immigrants are broadly eligible for public benefits, a requirement that the income of an immigrant's sponsor be deemed available to the immigrant for purposes of determining benefit eligibility effectively keeps most immigrants from receiving benefits for the first three years of residence. This requirement, known as "deeming," assumes the sponsor, who is usually but not always a family member, will provide the immigrant with financial support.

The deeming provision is closely tied to requirements for admission. In order to immigrate permanently, all legal immigrants (but not refugees) must prove that they will not become a "public charge." Immigrants can pass the public charge test by proving that they have a promise of gainful employment in the United States, substantial assets, or an affidavit of support signed by a sponsor. The affidavit of support, however, is not legally enforceable and therefore raises questions about the extent to which sponsors are held responsible for the immigrants they promise to support.[13]

Another set of principles relates largely to why we provide certain services to undocumented immigrants.

First, undocumented immigrants may receive certain services, such as immunizations, for reasons of public health or safety. Denying this service puts not only the undocumented immigrant at risk, but also his or her family members, neighbors and co-workers who may be legal immigrants or citizens. Public health services are unique in this regard: the more broadly this type of preventive service is provided, the greater the benefit to the rest of the population.

Second, certain services are provided to undocumented immigrants because it's cost-effective. The best example is prenatal care. Several states, including California and New York, provide coverage under their Medicaid programs for prenatal care for undocumented women. Research has shown that every dollar spent on prenatal care reduces expenditures on care after birth by between $2 and $10.[14]

Third, undocumented immigrants are provided coverage under certain federal programs to help pay for state and local costs, or for reasons of cost-reimbursement. For example, the Omnibus Budget Reconciliation Act of 1986 (OBRA) gave otherwise eligible undocumented immigrants coverage for emergency care under Medicaid. Under federal and state anti-dumping laws, public hospitals are required to provide people with emergencies with stabilizing treatment.[15] If undocumented immigrants were not insured or could not pay for their care, hospitals would pass on uncompensated costs to public and private payers, including states and localities. By making undocumented immigrants eligible for emergency care under Medicaid, a federal–state jointly funded program, the federal government pays for about half of the costs.

Finally, eligibility rules for immigrants reflect a principle of protecting children. As the Supreme Court ruled in its decision to require public schools to educate undocumented immigrants, children do not choose their immigration status and should not be punished for the actions of their parents.[16] This principle can also be seen in undocumented children's eligibility for programs such as Head Start and the food supplement program for Women, Infants and Children (WIC).

The principles guiding the provision of public services to immigrants are largely, and logically, in line with our immigration policies.[17] Therefore, those principles informing undocumented immigrant eligibility for services must be balanced against the principle of not rewarding undocumented immigration and maintaining the value of lawful membership in the society.

IV. Current Reform Proposals

A number of current federal and state legislative proposals would greatly alter our current system of eligibility for services. The most prominent and far-reaching of these are several proposals introduced in the 103rd Congress to reform welfare and a California initiative, Proposition 187, that denies a wide range of services to undocumented immigrants. The federal welfare reform proposals vary greatly in the extent to which they would alter current eligibility rules, but most would further restrict access of legal immigrants to welfare benefits.

Many of these proposals are not in line with one or more of the principles outlined above. Several factors account for this disjuncture. First, the reforms are often politically opportunistic, capitalizing on a climate increasingly unwelcoming to immigrants. Welfare reform proposals, for example, would restrict legal immigrant access to benefits in order to finance changes in the welfare and job training system, not because of new thinking about why immigrants should be eligible or ineligible for benefits. Second, many reforms are based on a myth of immigrant welfare dependency. In fact, immigrant use of welfare is concentrated among refugees and the elderly. Third, some reforms are based on misunderstandings about current eligibility rules. The California initiative, for example, denies all social services to undocumented immigrants, though they were already eligible for very few (e.g., foster care).[18]

Proposals to Change Immigrant Eligibility

This analysis will focus on three of the major welfare reform proposals introduced in Congress that would restrict immigrant access to public benefits.[19] The Clinton Administration proposal (Work and Responsibility Act of 1994) would increase the period during which a sponsor's income is deemed available to the immigrant from three to five years. This deeming provision applies to AFDC, SSI, and food stamps. (In what can be seen as the start of this trend, in 1993 the deeming period for SSI was extended from three to five years until 1996.[20]) After the first five years of residence, immigrants with sponsors who have annual family incomes above the U.S. median would be ineligible for benefits until the immigrant attains citizenship. The theory behind the deeming provision is that the family or sponsor will support the immigrant, but if the sponsor's income falls sufficiently low, the immigrant would have access to benefits.[21]

The proposal introduced by the House Democratic Mainstream Forum (H.R. 4414) is more restrictive than the Clinton proposal. It would bar lawfully present immigrants from receiving AFDC, SSI, food stamps, and Medicaid. The proposal exempts from the bar refugees and asylees for six years and immigrants over age 75 who have resided for five years in the United States.

The major Republican proposal (originally H.R. 3500, later revised and included in the Republican Contract with America) is the most restrictive of the major welfare reform proposals. It would deny legal immigrants access to 60 federal assistance programs. It also contains an exemption for elderly immigrants and refugees in their first six years.

California's Proposition 187, approved by voters in November 1994, denies public education, non-emergency health care and social services to undocumented immigrants, but does not alter eligibility for legal immigrants.

These proposals raise a host of questions related to the principles informing immigrant eligibility rules.

Rights of Legal Immigrants

The categorical restrictions in the Mainstream Forum and the Republican welfare reform proposals raise questions about one of the most fundamental principles driving our current eligibility rules: that legal immigrants should be broadly eligible for benefits on the same basis as citizens. Should immigrants who enter the country with the government's consent and who pay taxes be denied the safety net afforded to citizens? Does this categorical restriction relegate immigrants to second class status? Or, put differently, do we expect more from immigrants than citizens?

There is also an important distinction between the Mainstream Forum's proposed restrictions for four specific programs and the far more expansive restrictions proposed in the Republican bill. The Republican proposal would deny legal immigrants access to a range of public and preventive health services as well as nutrition and food programs for children. These broad restrictions run counter to many of the principles that inform our current eligibility rules, including public safety, cost-effectiveness, and the protection of children.

Family Responsibility

Though under current rules, legal immigrants are broadly eligible on the same basis as citizens, those rules also require immigrants' families to support them for a limited time. The Clinton proposal, by extending the deeming period, would build on this principle of family responsibility. Just as the categorical denial of services to legal immigrants raises questions about the different standards we hold them to, the deeming provisions raise the question of whether an immigrant's family should be held to a different standard than a citizen's family.

The deeming provision raises other equity issues as well. Because immigrants who enter under employment categories are less likely to need an affidavit of support to overcome the public charge test, these immigrants are less likely to have sponsors. Therefore, when an employment immigrant falls upon hard times in his or her first three or five years of residence, deeming provisions do not apply and the individual is eligible for benefits. Therefore, a different standard holds for employment than for family reunification immigrants. Should employers who petition to bring an immigrant into the United States be held responsible for the immigrant, as families are presumably held responsible for the immigrants they bring in?

The principle of encouraging family responsibility is in line with a broad trend to use welfare to encourage socially responsible behavior. For example, to stem out-of-wedlock births, several states, including New Jersey and Georgia, have placed caps on entitlements to mothers who have additional children while on welfare. Some federal reform proposals require teenage mothers to live at home in order to receive benefits. This requirement, like the deeming provision, directly encourages family responsibility. These reforms, however, raise a separate set of questions about the role welfare policy should play in changing behavior.

Cost-shifting and Cost-savings

Proposals to restrict immigrant eligibility for federal benefits would likely result in immigrants' increased use of state and local services, shifting costs to states and localities. This cost-shifting as well as the restrictions in Proposition 187 raise interesting questions about when states and localities have the right to make distinctions based on immigration status. The Clinton proposal specifies that states may establish eligibility criteria for their programs that are equivalent to the federal criteria the proposal would establish.[22]

Whether states have the right to make these distinctions remains in question. The Supreme Court ruled that state restrictions based on immigration status violate the equal protection clause of the 14th amendment. The Court also emphasized that the federal government, not states, has sole authority to regulate immigration.[23] Further, numerous states, including New York, have constitutions that require the state to provide care and support for their needy. Of course, Proposition 187, and law suits filed following its passage, will also test states' rights to make distinctions among different classes of immigrants.

The potential for cost-shifting to states and localities ties the eligibility issue to the question of reimbursement — whether the federal government should reimburse states and localities for costs associated with immigration. The last time the federal government explicitly barred a group of immigrants from receiving federal benefits (i.e., the population that legalized under IRCA was barred from receiving most federal benefits for five years), it provided $4 billion in impact assistance to states and localities. The responsibility that the federal government might have to reimburse states and localities, and the costs of doing so, should be balanced against any potential savings from restricting immigrant eligibility for federal benefits.

The extent to which restricting eligibility for services will result in cost-savings also warrants careful consideration. Proposition 187, for example, purports to save the state of California money by reducing illegal immigration. There is little evidence, however, that immigrants — legal or illegal — come to the United States in order to receive public benefits. On the contrary, the evidence strongly suggests that immigrants come to the United States to reunite with families and find employment.[24]

Further, the costs of providing a service are not necessarily the same as the savings reaped from denying that service. Restricting services to certain groups of immigrants requires verifying the citizenship or immigration status of all who apply. This verification process also has costs. Under current law, states are required to verify the immigration status of applicants for AFDC, Medicaid, food stamps, and unemployment compensation using the Systematic Alien Verification for Entitlements system (SAVE). Several states, however, have applied for waivers from the requirement because they have found the SAVE system to be cost-ineffective.

The costs of not providing such services as prenatal care, immunizations and preventive health care, as required under Proposition 187, would also result in greater long-term costs and risks to public safety. The denial of preventive care may also result in increased use of emergency services, a more costly form of care.[25]

Integration

The proposals to restrict immigrant eligibility for benefits also raise questions about the extent to which welfare or public services are provided to immigrants in order to help them integrate into society or to keep them from integrating into society. The contrast between refugees' and legal immigrants' eligibility for benefits underscores this tension. Refugees are provided with special benefits immediately after arrival, while through the deeming provisions, legal immigrants are effectively barred from receiving services immediately after arrival. In the first case, the front-loading of services is thought to help speed up integration. In the case of legal immigrants, the deeming provision is aimed at ensuring that they will not become a public charge. This provision can also be thought of as ensuring that immigrants do not integrate into, or adopt the values of, the segment of society that uses welfare.[26]

The provision in Proposition 187 to deny education to undocumented children also raises issues related to immigrant integration. As the Supreme Court stated in its decision to require states to provide education to undocumented children, "the deprivation of public education is not like the deprivation of other government benefits." Denying education to undocumented immigrants could result in the creation of an uneducated, disadvantaged and potentially permanent underclass. There is little evidence that undocumented immigrants who are denied public benefits will return to their home countries. Many undocumented immigrants could someday become legal immigrants or citizens, by, for example, marrying citizens or otherwise applying for a visa. This disadvantaged class would therefore be made up not only of undocumented immigrants but legal residents as well.

V. Conclusion

Restricting immigrants' eligibility for benefits raises a series of questions that have not been fully addressed in the current debate. This paper addresses some of these questions and raises others. Current efforts to reform welfare vary widely in the extent to which they would restrict legal immigrants' eligibility for benefits. All of them would make these restrictions to finance other changes in welfare. While welfare reform proposals raise questions about legal immigrants' membership in society and about the role of the family or sponsor in supporting the immigrant, California's Proposition 187 raises a separate set of questions related to why certain limited services are provided to undocumented immigrants. Addressing the questions raised by these reforms will help ensure that policies affecting immigrants are based not on myths and misperceptions but on sound principles.

Endnotes

[1] An earlier version of this paper was presented at a special session of the American Public Health Association annual meeting on November 1, 1994 in Washington, D.C.

[2] *See* Warren, Robert, "Estimates of the Resident Illegal Alien Population: October 1992." Immigration and Naturalization Service, August 1993.

[3] Fix, Michael, Jeffrey Passel, with Maria Enchautegui and Wendy Zimmermann, *Immigration and Immigrants: Setting the Record Straight*, The Urban Institute, Washington, D.C., May 1994.

[4] *See* Fix, Michael and Wendy Zimmermann, "After Arrival: An Overview of Federal Immigrant Policy," in *Immigrants and Ethnicity: The Integration of America's Newest Immigrants*, eds. Barry Edmonston and Jeffrey Passel, The Urban Institute Press, Washington, D.C., 1994; Zimmermann, Wendy, "Federal Retrenchment, State Burden: Declining Assistance for Immigrants," in *America's Newcomers: An Immigrant Policy Handbook*, ed. Ann Morse, National Conference of State Legislatures, Washington, D.C. 1994.

[5] P.L. 103-322 (H.R. 3355).

[6] Fix *et al.*

[7] Zimmermann, Wendy and Mitchell Tobin, "Immigration and Concentrated Poverty," The Urban Institute, Washington, D.C., forthcoming 1994.

[8] Fix *et al.*

[9] Scott, Charles, and Elsa Ponce, "Aliens Who Receive SSI Payments," Office of Supplementary Security Income, March 1994.

[10] Bean, Frank D., Kyung Tae Park, Jennifer V.W. Van Hook, Jennifer Glick, "Welfare Recipiency Among Immigrants: Implications for U.S. Immigrant Policy," The Urban Institute, Washington, D.C., January 1994.

[11] *See* Fix *et al.*; Clark, Rebecca, Jeffrey Passel, Wendy Zimmermann, Michael Fix, with Rosalyn Berkowitz, Taynia Mann, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States*, The Urban Institute, Washington, D.C., September 1994.

[12] Eig, Larry M., Joyce C. Vialet, "Alien Eligibility Requirements for Major Federal Assistance Programs," CONGRESSIONAL RESEARCH SERVICE, The Library of Congress, December 8, 1993.

[13] See U.S. Commission on Immigration Reform, "U.S. Immigration Policy: Restoring Credibility," Report to Congress, September 1994. The Commission has proposed making affidavits of support legally enforceable.

[14] General Accounting Office, "Prenatal Care Medicaid Recipients and Uninsured Women Obtain Insufficient Care," Human Resources Division, Report GAO/B-229112, Washington, D.C., September 1987.

[15] 42 U.S.C. Sect. 1395dd. *See* Michele Melden, Michael Parks, and Laura Rosenthal, "Health Care Rights of the Poor: An Introduction," Clearinghouse Review, November 1991, pp. 896-903.

[16] *Plyler v. Doe*, 457 U.S. 202 (1982).

[17] It could also be argued, however, that there are ways in which our current eligibility rules are not in line with these principles. For example, additional preventive care for undocumented children would result in greater cost-savings and would be in line with the principle of protecting children. Ensuring that verification systems used to keep ineligible immigrants from receiving benefits do not keep eligible immigrants from receiving those benefits would further the principle of including legal immigrants in the system.

[18] Other bills introduced in Congress also deny services to undocumented immigrants for which they are already ineligible. (H.R. 3860, H.R. 3594, 103rd Congress, for example.)

[19] The fourth major welfare reform proposal, introduced by Rep. Matsui (H.R. 4767), did not contain any changes in immigrant eligibility for benefits.

[20] P.L. 103-152 extends the deeming period for SSI from three to five years for those applying for benefits beginning January 1, 1994, and ending October 1, 1996. This law was passed explicitly to raise money to extend unemployment compensation benefits.

[21] The Clinton bill would also apply a uniform standard for determining immigrant eligibility under AFDC, SSI, and Medicaid. This change would eliminate the permanently residing under color of law (PRUCOL) standard currently used in those benefit programs.

[22] In *Mathews v. Diaz* the Supreme Court held that Congress can draw distinctions both between citizens and aliens and among different classes of aliens, so long as those distinctions are not "wholly irrational." 426 U.S. 67 (1976).

[23] *Graham v. Richardson*, 403 U.S. 365 (1971)

[24] *See,* for example, "Report on the Legalized Alien Population," U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., March 1992.

[25] California's estimated savings of the costs of providing, for example, education may also be exaggerated because they are based on average not marginal costs. That is, certain fixed costs such as teachers, books and administration are built into average per pupil costs. Additionally, some of California's costs of providing services to undocumented immigrants are too high. *See Clark et al.*, 1994.

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Chapter XVII

Federal Action to Confront Hate Crimes: Preventing Violence and Improving Police Response

by Michael Lieberman[1]

Introduction

With many indications that hate violence is on the rise, and with questions concerning the constitutionality of hate crime penalty-enhancement laws apparently resolved, attention has turned to education and outreach to assist bias crime victims and to improve police response to the problem. Importantly, progress is also being made in efforts to complement legal and law enforcement responses to hate violence with expanded efforts to address prejudice and discrimination among young Americans.

Hate crimes — criminal acts in which an individual is targeted because of race, religion, sexual orientation, ethnicity, or national origin — are designed to intimidate both victims and members of the victim's community in an effort to leave them feeling isolated, vulnerable, and unprotected by the law. These crimes can have a special emotional and psychological impact on the victim and his/her community, exacerbate racial, religious, or ethnic tensions, and lead to reprisals by others in their community — thereby creating the potential for escalating violence and turmoil.

The Magnitude of the Problem: Increasing Numbers or Better Reporting?

Both local and national responses to hate violence have been hampered by a lack of comprehensive, comparative data concerning the number, location, and types of hate crimes. To date, only 19 states and several municipal police departments have established systematic hate crime data collection procedures.[2]

Studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to the police.[3] In addition to cultural and language barriers, some immigrant victims fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police — especially if they were in trouble.[4] Gay and lesbian victims, facing hostility, discrimination, and, possibly, family pressures because of their sexual orientation, may also be reluctant to come forward to report these crimes.

Several private organizations also track hate crimes. The Anti-Defamation League (ADL) has conducted an annual audit of one type of hate crime — anti-Semitic incidents — reported to ADL regional offices around the country since 1979. The League's 1993 Audit of Anti-Semitic Incidents[5] revealed 1,867 separate incidents — a 7% increase over 1992 and the second highest figure ever recorded. The League's findings also revealed a significant increase in assaults, threats, and harassment against individuals. The disturbing upward spiral of anti-Semitic incidents on college campuses continued: 122 incidents reported at 81 campuses. Since 1988, anti-Semitic incidents have jumped 126% on campus.

The National Gay & Lesbian Task Force's (NGLTF) 9th annual survey on violence"[6] documented 1,813 anti-gay incidents in six U.S. cities, a welcome

14% decrease after five years of steady increases in anti-gay violence. Since 1988, anti-gay incidents increased 127% in five cities that include Boston, Chicago, Minneapolis/St. Paul, New York City, and San Francisco.[7]

The National Asian Pacific American Legal Consortium (NAPALC) published the first national anti-Asian violence compilation in April, 1994.[8] The report documented 335 separate anti-Asian incidents for 1993, mainly in California, New York, and New Jersey, where the majority of Asian Pacific Americans live.

Law Enforcement Response to Have Violence: New Tools, New Expectations

Because of their volatile nature, hate crimes merit a special response from police officers and civic leaders. Too frequently victims do not receive the attention they deserve, with attacks against them dismissed as "pranks" or ordinary cases of vandalism, assault, or arson. This lack of attention can lead to an explosive situation. The residential neighborhoods of Howard Beach, Bensonhurst, and Crown Heights, New York have become indelibly linked with the murderous incidents of hate violence that occurred in those communities — and the riots that followed. For this reason, in partnership with human rights groups, the law enforcement community has played a leadership role in supporting hate crime penalty-enhancement and data collection initiatives — both before Congress and in state legislatures.[9]

Federal Action: Counting Crimes and Improving Police Response

The Hate Crime Statistics Act (Public Law 101-275).

The Hate Crime Statistics Act (HCSA), enacted in 1990, requires the Justice Department to collect data on crimes that "manifest prejudice based on race, religion, sexual orientation, or ethnicity" and to publish an annual summary of the findings. The Act, which was amended to included disability-based crimes in the omnibus crime bill enacted in September,[10] provides government and law enforcement officials with a tangible, practical tool to enhance police-community relations.

Police authorities recognize that tracking hate crimes can help departments craft preventative strategies. By compiling statistics and charting the geographic distribution of these crimes, police officials may be in a position to discern patterns and anticipate an increase in racial tensions in a given jurisdiction. In addition, surveys indicate that victims are more likely to report a hate crime when they know a special reporting system is in place.[11]

The focus has now turned to implementation of the HCSA by the Federal Bureau of Investigation (FBI), as well as by state and local law enforcement officials. While the Act required data collection only for calendar years 1990-1994, the FBI has incorporated hate crime data collection into its current Uniform Crime Reporting (UCR) program and has made plans to permanently integrate the mandate as the UCR program changes from a summary-based reporting system to an incident-based system (NIBRS).[12]

To its credit, the FBI utilized existing resources in developing an excellent training manual[13] and data collection guidelines.[14] These two well-crafted and inclusive documents have now been distributed to more than 16,000 law enforcement agencies nationwide. The FBI has also arranged training seminars on how to identify, report, and respond to hate crimes for state and local law enforcement authorities. Well beyond mere instructions on how to fill out forms, these programs have featured presentations on the nature of prejudice, the impact of hate violence. and the utility of the data. As of November 1994, the FBI reported that it had provided training for 3,200 law enforcement officials, from more than 1000 agencies

Early HCSA Data: An Incomplete Picture. In January 1993, the FBI released its first report on hate crime data collected by law enforcement agencies around the country. The report documented a total of 4,558 hate crimes in 1991, reported from almost 2,800 police departments in 32 states.[15] The Bureau's 1992 data, released in March 1994, documented 7,442 hate crime incidents reported from more than twice as many agencies, 6,181.[16] The 1993 data, released at an HCSA oversight hearing before the Senate Judiciary Constitution Subcommittee, documented 7,684 incidents reported from 6,840 agencies in 46 states and the District of Columbia.[17]

Substantial work on local HCSA implementation remains to be done, as evidenced by findings from the FBI's jurisdiction-by-jurisdiction report for 1992 data, released in June:[18]

- Law enforcement agencies in only 20 of the 30 largest cities in America (and 52 of the largest 100) reported hate crime data to the FBI for 1992.[19] In eight of the top 20 jurisdictions, the data reported was obviously incomplete.[20]
- Only 18% of the almost 6,200 agencies that provided 1992 HCSA data to the FBI reported any hate crimes — the other 82% reported that they had zero hate crimes in their jurisdiction.
- Nine states did not have a single law enforcement agency reporting HCSA data for 1992[21] — and agencies in nine other states reported less than ten hate crime incidents statewide.[22]

The 6,800 participating law enforcement agencies in 1993 — though only a fraction of the nation's 16,000 departments — reflect well on the FBI's initial HCSA outreach and education efforts. To date, many departments have failed to report HCSA statistics, citing the burden of additional paperwork, fears about negative publicity, or budget constraints.[23] The first three years of HCSA reports, though obviously an incomplete picture, reveal useful information about victims and perpetrators of hate violence:

- More than 60% of the almost 20,000 reported hate crime incidents were race-based. Crimes committed against individuals on the basis of their religion were the second largest category, followed by crimes committed on the basis of sexual orientation and ethnicity.
- About 36% of the reported crimes were anti-black, and 20% of the crimes anti-white. Crimes against Jews and Jewish institutions comprised the vast majority of the religion-based crime — about 16% of the total reported incidents.
- Crimes against persons made up well over 70% of the offenses reported to the FBI — including 44 murders. Intimidation was the most frequently reported crime, followed by destruction/damage/vandalism to property, and assaults.

Implementing the HCSA: Advancing Police-Community Relations. Law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.[24] When police departments implement the HCSA in partnership with community-based groups, the effort should enhance police-community relations.[25]

The federal government should actively promote expanded data collection and training under the HCSA. Beyond mere numbers, implementation of the HCSA has dramatically increased awareness of this national problem and sparked improvements in the overall response of the criminal justice system to hate crimes.[26] As participation in the FBI's HCSA program expands, we will learn more about the perpetrators of hate crimes — and how to prevent them.

Hate Crime Statutes: A Message to Victims and Perpetrators

At present, 47 states and the District of Columbia have enacted some type of statute addressing hate violence.[27] In *Wisconsin v. Mitchell*,[28] decided in June, 1993, the U.S. Supreme Court unanimously upheld the constitutionality of a Wisconsin hate crime penalty-enhancement statute similar to laws in more than two dozen other states. The Court's approval of this statutory approach, first drafted by the Anti-Defamation League in 1981, removes any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is targeted because of his/her personal characteristics.

The intent of penalty-enhancement hate crime laws is not only to reassure targeted groups by imposing serious punishment on perpetrators of hate crimes, but also to deter these crimes by demonstrating that they will be dealt with in a serious manner. Under these laws, no one is punished merely for bigoted thoughts, ideology, or speech. But when prejudice prompts an individual to act on these beliefs and engage in criminal conduct, a prosecutor may seek a more severe sentence, but must prove, beyond reasonable doubt, that the victim was selected because of his/her personal characteristics.[29]

The Hate Crimes Sentencing Enhancement Act (HCSEA)

Congress enacted a hate crime penalty enhancement statute that would increase the penalties for federal crimes where the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person," as part of the omnibus crime bill signed into law in September 1994.[30] The HCSEA was sponsored by Reps. Charles Schumer (D-NY) and James Sensenbrenner (R-WI), and Sen. Dianne Feinstein (D-CA).

Legal Challenges to Hate Crime Statutes

Over the past five years, hate crime laws in a number of states have been challenged by individuals charged under them.[31] These suits have generally been based on claims that the laws are vague and overbroad and impermissively infringe on First Amendment freedom of expression. In the past two terms, the U.S. Supreme Court has reviewed the constitutionality of two different hate crime laws. The different results in these cases are instructive both for the drafting of future statutes and for enforcement of current laws.

R.A.V. v. St. Paul: [32] A Flawed Approach to Hate Violence

The first hate crime case to reach the Supreme Court involved a challenge to a St. Paul, Minnesota ordinance.[33] Prosecutors charged a teenager with violating this ordinance after he burned a cross in the yard of a black family in the middle of the night. The defendant challenged the ordinance, asserting that it was overbroad and violative of the First Amendment. The trial court ruled in favor of the defendant's motion[34] but the Minnesota Supreme Court reversed.

On June 22, 1992, the U.S. Supreme Court unanimously struck down the St. Paul ordinance as an unconstitutional infringement on protected speech, but the Justices were divided as to why.[35] Justice Scalia's five-member majority opinion held that the ordinance was invalid because it constituted "content discrimination." Four other Justices concurred in the result, but made clear they would have held the St. Paul ordinance unconstitutional because it could be applied to punish protected expression as well as criminal conduct.

Wisconsin v. Mitchell:[36] The Penalty Enhancement Approach

The Court in *R.A.V.* was silent on the constitutionality of penalty-enhancement laws, but took up this question last term in *Wisconsin v. Mitchell*. Disturbed by a recent viewing of the movie "Mississippi Burning," Todd Mitchell exhorted a group of young Black males to take action against Whites. A short time later, a 14-year old white male walked by their apartment complex. At Mitchell's urging, the group beat the youth severely, resulting in possible permanent brain damage.

After a jury trial, Mitchell was convicted of aggravated battery, which carries a maximum sentence of two years' imprisonment. But because the jury also found that Mitchell had intentionally selected the victim because of his race, the maximum sentence was increased to seven years. The trial court rejected Mitchell's contention that the statute was unconstitutional and sentenced him to four years' imprisonment. An appellate court affirmed the conviction,[37] but the Wisconsin Supreme Court reversed, holding that the statute violates the First

Amendment by punishing "offensive thought" and by "chilling free speech."[38]

A broad and impressive group of government officials, and human rights, police, and civil liberties organizations — headed by the United States Solicitor General and Attorneys General from the 49 other states — filed *amicus* briefs urging the Supreme Court to distinguish laws that restrict speech from laws, like Wisconsin's, that more severely punish bias-motivated conduct. Supporters of the Wisconsin statute asserted that the law is consistent with the First Amendment because it proscribes conduct, not speech, expression, or thought.[39]

On June 11, 1993, a unanimous Supreme Court dismissed Mitchell's free speech arguments, holding that Mitchell's actions constituted "conduct unprotected by the First Amendment." The Court recognized that these laws do not suppress free expression, since they do not affect the rights of anyone to hold or promote any viewpoint, publicly or privately.[40] Finally, the Court distinguished its holding in *R.A.V.*, stating "[t]he First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

New Initiatives to Confront Violent Bigotry

A. Educating to Prevent Prejudice

There is growing awareness of the need to complement tough laws and more vigorous enforcement — which can deter and redress violence motivated by bigotry — with education and training initiatives designed to reduce prejudice.[41] The federal government has a central role to play in funding program development in this area and promoting awareness of initiatives that work.

1. The Juvenile Justice Delinquency Prevention Act

In 1992, under the leadership of Sen. Herb Kohl (D-WI) and Rep. Nita Lowey (D-NY), Congress approved several new hate crime and prejudice-reduction initiatives as part of the four-year Juvenile Justice and Delinquency Prevention Act reauthorization.[42] In response, the Justice Department's Office of Juvenile Justice Delinquency Programs (OJJDP) allocated $100,000 for a Hate Crime Study to identify the characteristics of both the juveniles who commit hate crime and their criminal acts. In addition, OJJDP has also funded a $50,000 grant for the development of a wide-ranging curriculum to address prevention and treatment of hate crimes committed by juveniles.

2. The Office for Victims of Crime

In addition, at the direction of Congress, the Justice Department's Office for Victims of Crime (OVC) provided a $150,000 grant for the development of a training curriculum to improve the response of law enforcement and victim assistance professionals to victims of hate crimes.[43] The OVC training curriculum also promotes coordinated action between law enforcement officials and victim assistance professional in the investigation and prosecution of these crimes.

3. The Elementary and Secondary Education Act (ESEA)

This year, for the first time, Congress acted to incorporate anti-prejudice initiatives into the ESEA, the principal federal funding mechanism for the public schools.[44] Title IV, Safe and Drug-Free Schools and Communities, also contains a specific hate crimes prevention initiative — promoting curriculum development and "professional training and development for teachers and administrators on the cause, effects, and resolutions of hate crimes or hate-based conflicts." This provision, sponsored by Rep. Nydia Velazquez (D-NY) and included among a number of other Department of Education discretionary programs, is the progeny of an initiative developed and promoted with former Rep. Ted Weiss (D-NY) in the 102nd Congress. These new federal initiatives represent a significant step forward in efforts to institutionalize prejudice reduction as a component of violence prevention programming.

B. The Violence Against Women Act: A New Civil Rights Remedy

The Violence Against Women Act (VAWA), enacted as Title IV of the omnibus crime bill, declares that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender."[45] The new law provides authority for victims of gender-based crimes to bring a civil suit, in either federal or state court, for money damages or injunctive relief. According to the NOW Legal Defense and Education Fund — the organization that coordinated the broad, bipartisan support for VAWA — for many victims of gender-based crimes, VAWA may be their only avenue for redress.[46]

Recommendations: An Action Agenda for the Future

1. The Hate Crime Statistics Act and Hate Crime Training Initiatives

- Congress should reauthorize the HCSA in 1995 to underline the importance of the program and to ensure that hate crime data collection remains a permanent part of the FBI Uniform Crime Reporting program.
- The FBI has been receptive to requests for HCSA training for state and local law enforcement officials. The Administration and Congress should take steps to ensure that the FBI receives sufficient funding to continue to respond to requests for hate crime training from law enforcement agencies across the country, as well as funding to continue its own training and education outreach efforts for both new agents and in-service training for field agents at its own Quantico training academy.
- Congress should provide additional incentives for HCSA implementation, including national recognition, matching grants for training, a network to promote replication of successful programs, and awards for exemplary departments.
- The Administration and Congress should ensure that the Treasury Department receives sufficient funding for its Federal Law Enforcement Training Center (FLETC) to complete its hate crime curriculum development initiative and deliver this program to federal, state, and local law enforcement officials through FLETC's National Center for State and Local Law Enforcement Training.

2. The Justice Department's Community Relations Service (CRS)

CRS is the only federal agency that exists to mediate intergroup disputes. While both the White House and the Attorney General have repeatedly stressed the importance of crime prevention, the potential for CRS involvement in these efforts has not yet been appreciated. In fact, a Director for the Service has not been appointed two years into the Clinton administration.

Limited by its authorizing statute (Title X of the Civil Rights Act of 1964) to respond only to conflicts based on race, color, and national origin, CRS has been unable to respond to well-documented evidence that a high incidence of hate-based crimes are committed against gays and lesbians and religiously identified people.[47] More than 2,000 of the almost 6,800 hate crimes documented by the FBI under the HCSA for 1993, were reported on the basis of sexual orientation and religion.[48] A number of prominent law enforcement organizations have indicated support for an expanded mandate for CRS.[49]

- Congress should act to expand the mandate of CRS to include providing mediation and conciliation services on the basis of sexual orientation and religion. The expanded mandate should be accompanied by increased resources to enable CRS to carry out its responsibilities effectively.
- The White House should appoint a CRS Director with the vision to lead the agency with its expanded mandate to meet today's challenges.

3. Federal Civil Rights Statutes

Federal law provides civil and criminal remedies for victims of racially and religiously motivated violence. While the number of federal prosecutions for racial violence is small — 35 prosecutions involving 74 defendants in 1994 (double the number of defendants from 1993) — these efforts supplement state and local criminal prosecutions and are especially significant in situations where local prosecutors have been unable (or unwilling) to effectively vindicate rights. A significant number of these racial violence cases involve prosecutions of members of the Ku Klux Klan and other organized hate groups. These cases — 12 in 1994, involving 24 defendants — play an important role in demonstrating the federal government's resolve to combat organized bigotry.[50]

In consultation with Justice Department officials, attorneys for several civil rights groups are now examining the possibility of amending 18 USC Section 245 to eliminate unnecessary obstacles to federal prosecutions. This statute prohibits intentional interference, by force or threat of force, with enjoyment of a federal right or benefit (like voting) on the basis of the victim's race, color, religion, or national origin. One amendment under consideration would eliminate the federal protected activity requirement and broaden the protected classes to include individuals victimized on the basis of their sexual orientation or gender.

- Congress should act to amend 18 U.S.C. Section 245 to eliminate the federal protected activity requirement and permit prosecutions on the basis of sexual orientation and, where appropriate, gender.

4. Education

The American Psychological Association (APA) in its landmark 1993 report, *Violence and Youth: Psychology's Response*,[51] documented the role of prejudice and discrimination in fostering social conflict that can lead to violence. Educational resources are effective tools to alter attitudes and behaviors — which in turn can prevent and reduce acts of hatred and discrimination.[52]

- The federal government should promote democracy-building and citizenship initiatives — measures to support teaching about the Bill of Rights and the importance of cultural diversity and acceptance of cultural differences in the United States.
- Prejudice reduction initiatives should be institutionalized as an element of community and school anti-violence initiatives, and workshops and seminars on hate violence should be integral parts of school anti-violence conferences.
- The Department of Education should make information available regarding successful prejudice-reduction and hate crime prevention programs and resources. Resources must be allocated to institute and replicate programming on prejudice awareness, religious tolerance, conflict resolution, and multicultural education.

All Americans have a stake in effective response to violent bigotry. The fundamental cause of hate violence in the United States is the persistence of racism, bigotry, and anti-Semitism. Unfortunately, there is no quick, complete solution to these problems — legislative or otherwise. The long-term response is education and experience, leading to better understanding and acceptance of different cultures and diversity in our society. While bigotry cannot be outlawed, the federal government has an essential role to play in confronting criminal activity motivated by prejudice and in promoting prejudice reduction initiatives for schools and the community.

Selected Resources on Hate Violence Counteraction

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Endnotes

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[3] *Racial and Religious Violence: A Model Law Enforcement Response*, National Organization of Black Law Enforcement Executives (NOBLE), September 1985, p.36 [NOBLE Report].

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[5] *1993 Audit of Anti-Semitic Incidents*, Anti-Defamation League, January 1994.

[6] *Anti-Gay Violence, Victimization & Defamation in 1993*, National Gay & Lesbian Task Force, 1994.

[7] According to NGLTF's surveys, violent and homophobic incidents notably increased in the wake of highly publicized anti-gay referenda in Oregon and Colorado in 1992.

[8] NAPALC Anti-Asian Violence Report.

[9] Congress has overwhelmingly supported hate crime counteraction initiatives in a bipartisan manner. The Hate Crime Statistics Act was approved 92-4 by the Senate in February 1990, and 402-18 by the House in April, 1990. The House approved the Hate Crime Sentencing Enhancement Act by voice vote in September 1993. The Senate voted 95-4 in November, 1993 to add this provision to the omnibus crime bill.

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An updated report for 1993 is scheduled for release at the end of 1994. Importantly, this detailed breakdown by jurisdiction provides a baseline for human relations groups and community activists for follow-up and outreach to police chiefs, mayors, and other civic leaders on ways to improve reporting and municipal response to hate violence.

In coordination with law enforcement authorities, community-based groups and victim support organizations can complement law enforcement efforts to reduce the victim's sense of isolation and vulnerability.

In addition to urging constituents to report hate crimes and assist at the investigation and prosecution stages, these organizations can assist in analyzing the hate crime data for both their own constituents and for the media. This context can be especially useful in the case of aggressive, diligent police agencies who are called upon to explain why their hate crime numbers are higher than neighboring, less attentive departments. Community groups will know which agencies have made serious efforts to confront hate violence.

[19] Among the law enforcement agencies that did *not* report HCSA data in 1992 were: Los Angeles, Philadelphia, San Diego, Cleveland, Indianapolis, Columbus, Memphis, Detroit, Nashville, and San Jose. It is regrettable that only a little more than half of the law enforcement agencies that have participated in FBI-sponsored training reported 1992 hate crime data to the Bureau.

[20] Based on comparisons with other cities of about equal size.

[21] Alaska, Hawaii, Montana, Nebraska, New Hampshire, New Mexico, South Dakota, Vermont, and West Virginia.

[22] Alabama (4), Kansas (3), Kentucky (5), Mississippi (0), North Carolina (1), North Dakota (1), South Carolina (4), Tennessee (4), Wyoming (0).

[23] Especially troublesome was the dismal HCSA reporting of California law enforcement agencies — 10 of the approximately 700 departments in the state reported HCSA data to the FBI for 1993. Because about 40% of the nation's Asian American population lives in California, it is clear that the HCSA numbers, to date, significantly underreport crimes against Asian Americans. However, at the end of September, California law enforcement agencies received a very welcome new directive from the state Department of Justice requiring them to submit copies of hate crime reports to the Department's Law Enforcement Information Center (LEIC). LEIC has announced that it will now be conducting statewide training seminars on reporting hate crimes and will forward hate crime data to the FBI for its HCSA reports.

[24] As stated in the International Association of Chiefs of Police's National Policy Center's Concepts and Issues Paper on Hate Crime: "Swift and effective response to hate crimes helps to generate the degree of trust and goodwill between the community and its law enforcement agency that has long-term benefits for all concerned."

[25] Collecting data under the HCSA — and training officers to identify, report, and respond to acts of violence based on prejudice — demonstrates a resolve to treat these inflammatory crimes seriously. These positive steps can be amplified by involving representatives of minority communities in the training sessions.

[26] The U.S. Conference of Mayors and the ADL jointly published a report in June, 1992 entitled, "Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities." Included in this report were results from a survey sent to 1,000 cities — the most comprehensive national survey to date on issues relating to hate crimes. The results from the 157 responding cities provide a snapshot of progress on the hate violence response front since the enactment of the HCSA:

- Police departments in 71% (109) of the survey cities have begun to report hate crime data to the FBI.
- Police departments in 47% (73) of the cities reported that they have special written policies, procedures, or directives on reporting and responding to bias-motivated violence — many promulgated or revised after passage of the HCSA.
- Police departments in 31% (48) of the survey cities have a special unit or task force to handle bias-motivated criminal activity.
- Law enforcement training centers in 64% (100) of the survey cities have course work or training sessions on responding to hate crime. In 76%(119) of the cities, sessions are offered on cultural diversity. In 71% (112) of the cities courses are included on prejudice awareness and discrimination. Many of these courses were developed or updated after the passage of the HCSA.

The Conference of Mayors and ADL are currently updating this survey.

[27] For the most comprehensive state-by-state listing of hate crime statutes, *see ADL Hate Crime Laws Report*.

[28] 113 S. Ct. 2194 (1993).

[29] Penalty enhancements are frequently authorized in line with the character of the crime (such as when the offender conceals his/her identity or uses a deadly weapon), as well as when the victim is targeted because of special status (elderly, very young, or disabled), or vocation (police officer, President of the United States). Many state hate crime statutes also include provisions authorizing civil suits for damages and injunctive relief by victims, as well as parental liability for minor children's actions.

[30] Public Law 103-322.

[31] For a comprehensive review of these legal challenges, *see ADL Hate Crime Laws Report*.

[32] *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

[33] The Ordinance provided "whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor."

[34] *In re Welfare of R.A.V.*, 464 N.W. 2d 507 (Minn.1991).

[35] *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

[36] 113 S. Ct. 2194 (1993).

[37] 163 Wis. 2d 652, 473 N. W. 2d (1991).

[38] 169 Wis. 2d 153, 485 N. W. 2d (1992). The court held that because the statute required no additional act beyond that needed to make out a conviction on the underlying statute, the additional penalty was actually punishment for bad motives.

[39] The ADL's brief in support of the Wisconsin statute included 15 national organizations, including the IACP, People For the American Way, NOBLE, the Southern Poverty Law Center, the National Gay and Lesbian Task Force, and the Fraternal Order of Police. Other briefs urging the Court to uphold the statute were filed by the American Civil Liberties Union, the National Conference of State Legislatures, the U. S. Conference of Mayors, and the National Governors Association.

[40] The Court compared these hate crime laws to federal and state anti-discrimination laws — the constitutionality of which have been repeatedly upheld.

[41] American schools have an increasingly diverse racial, religious, and ethnic population, a trend that will continue in the coming years. Schools are often the first institutions to reflect changing demographics and variations in our nation's culturally varied population. Every student enters the school building carrying his/her particular cultural norms, practices, beliefs, values, and attitudes. Schools and individual students are greatly affected by intergroup tensions that too-frequently accompany a changing, culturally diverse student body.

[42] Public Law 102-586.

[43] *Bias Crimes: National Bias Crime Training for Law Enforcement and Victim Assistance Professionals*, Education Development Center, Inc., Massachusetts Criminal Justice Training Council, and the Office for Victims of Crime, 1994.

[44] Public Law 103-382. Importantly, since the definition of hate crime is taken from the HCSA, the programming in this area can be broadly inclusive.

[45] Public Law 103-322.

[46] *Civil Rights Remedy for Gender-Motivated Violence*, NOW Legal Defense and Education Fund, November 1, 1994.

[47] CRS has determined that anti-Semitism can be defined as conflict based on national origin or race and has offered its services. In addition, CRS has responded to intercommunal violence directed at the gay and

lesbian communities on one occasion. On February 17, 1994, Attorney General Reno exercised the authority given to her as Attorney General under 28 U.S.C. §509-510 to direct CRS to intervene in a community dispute involving a campaign of terror and harassment against a lesbian couple in Ovett, Mississippi.

[48] CRS has provided both valuable staff assistance and significant funding for both the FBI and FLETC for their inclusive, broad-based hate crimes outreach and training programs.

[49] In letters to Don Edwards, Chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, the Police Executive Research Forum, the National Association of Police Organizations, the National Sheriffs' Association, and the International Association of Chiefs of Police all expressed support for an expanded statutory mandate for CRS.

[50] Facing growing numbers of violent neo-Nazi skinhead youth gangs, both the Anti-Defamation League and the Japanese American Citizens League have called on the Justice Department to reestablish its Skinhead Task Force. In 1989 and 1990, federal efforts resulted in a series of grand jury investigations in Dallas, Tulsa, and Nashville which led to successful Skinhead prosecutions for civil rights violations. Numerous other Skinhead investigations resulted in arrests throughout the country by the FBI and state and local police agencies. For more information, *see Young Nazi Killers, The Rising Skinhead Danger, Anti-Defamation League, 1993.*

[51] *Violence and Youth: Psychology's Response*, American Psychological Association, 1993. The APA report asserts that education programs that reduce prejudice and hostility are integral components of plans to address youth violence. The report concludes that conflict resolution and prejudice reduction programs can provide needed information and skills to prevent youth violence.

[52] There are many existing programs designed to address prejudice. For example, ADL's "A World of Difference Institute," founded in Boston in 1985 and now operating in more than 30 cities, provides training and educational programming about the roots and consequences of prejudice. "A World of Difference" combines specially produced television programming, public service announcements, teacher training, curriculum materials, community-based projects, and video resource materials designed to help children and adults explore issues of prejudice and diversity. To date, more than 110,000 elementary and secondary school teachers nationwide have been trained to address prejudice and to better value diversity.

Chapter XVIII

Access to Justice: Environmental Justice

by Alice L. Brown

I. Introduction

Numerous studies conducted since the early 1980s demonstrate that minority communities bear a disproportionate share of the burdens attendant to this country's waste and pollution.[1] This disparate treatment has been called environmental discrimination, environmental injustice, or environmental racism. With awareness of environmental discrimination has come the environmental justice movement, born of a desire on the part of affected communities and other concerned persons to challenge the discriminatory distribution of environmental risks and hazards, and the discriminatory manner in which local, state, and federal authorities enforce environmental laws and regulations.

Ten years ago, the term "environmental justice" had not yet been coined, and activism targeted toward environmental degradation in minority and low-income communities was sporadic and not well publicized. Today, the environmental justice movement is represented by thousands of individuals and community-based organizations throughout the United States. Many of these persons and organizations are, in turn, connected to regional and national networks dedicated to promoting the environmental health and quality of minority communities. These entities have put governmental agencies — locally, regionally, and nationally — on notice that citizens suffering from a disproportionate share of society's waste and pollution demand equal protection under the law.

II. Clinton Administration Actions

Against this backdrop, the issue of environmental justice has received a prominent place on the agenda of the Clinton Administration. For example, on Earth Day, April 21, 1993, President Clinton declared that the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) would "begin an interagency review of federal, state, and local regulations and enforcement that affect communities of color and low-income communities with the goal of formulating an aggressive investigation of the inequalities in exposure to environmental hazards."[2]

Moreover, at the beginning of her tenure as EPA Administrator, Carol Browner, a Clinton-appointee, listed environmental justice as one of four priorities for her term at EPA.[3] In addition, she stated that "we must explicitly recognize the ethnic, economic, and cultural make-up of the people we are trying to protect."[4] Contrast this to the skepticism of an EPA committee convened by Administrator Reilly in 1990. That committee reported that although there are clear differences between racial groups in terms of disease and death rates, there is an absence of data to document the environmental contribution to these difference.[5] Clearly, the Clinton Administration has taken the issue of environmental justice seriously.

One prime example of the attention being given to environmental justice concerns at the highest levels of government is Executive Order No. 12,898, 59 Fed. Reg. 7629, (Feb. 11, 1994), entitled "Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations." President Clinton issued this order to focus federal attention on the environmental and health conditions in minority and low-income communities. The Order is intended to promote nondiscrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.

The Order applies to federal agencies named to an Interagency Working Group, and other agencies designated by the President, that conduct activities that substantially affect human health or the environment.[6] The Working Group has a mandate to assist in coordinating research and to stimulate cooperation between federal agencies. It is also authorized to assist in the coordination of data collection and to examine existing data and studies on environmental justice. Moreover, the Working Group will hold public meetings and develop interagency model projects on environmental justice that demonstrate cooperation among federal agencies.

Under the terms of the Order, each agency must develop an agency-wide environmental justice strategy to identify and address the disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations. There are a series of interim steps and measures, along with specific deadlines, that each agency must take to fulfill the requirements. By April 11, 1995, the Working Group must report to the President, through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy, on implementation of the Order.

As observed by Gerald Torres, Counsel to the Attorney General, the Executive Order is a response to regulatory problems, and, while respecting the independent regulatory cultures that exist throughout the federal government, the Order recognizes the need to make certain that independent regulatory processes proceed coherently. Accordingly, the Order established a federal working group whose jurisdiction cuts across all federal agencies.[7]

III. Recommendations and Conclusion

The Executive Order is a step in the right direction but there is more to be done. The hope is that the process of redressing environmental injustice will not get bogged down in the establishment of ineffectual infrastructure and procedure — concrete actions and strategies must be taken to relieve the burden placed upon far too many minority and low-income communities.

One strategy would involve Title VI of the Civil Rights Act of 1964, which prohibits the federal government from providing financial assistance to any program operated in a racially discriminatory manner. Specifically, Title VI mandates that

> [n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[8]

In addition, although Title VI itself requires proof of discriminatory intent, agencies may validly adopt regulations implementing Title VI that also prohibit discriminatory effects.[9] EPA is among the agencies that have adopted such regulations.

The EPA funds a large variety of environmental programs and has enormous power over its funding recipients. For instance, from 1982–1986, EPA grants to state governments funded 47% of state air quality control programs, 38% of state water quality programs, and 54% of state hazardous and solid waste control programs.[10] During fiscal year 1993, EPA awarded nearly 7,000 grants totaling more than $4.3 billion in federal funds.[11] Pursuant to Title VI, every program or activity receiving federal funds from EPA must comply with Title VI and its implementing regulations and the EPA is charged with the responsibility to enforce this law.

Historically, however, EPA — along with other federal agencies — has been delinquent with regard to Title VI enforcement. In 1975, the U.S. Commission on Civil Rights found that regional EPA staff across the country did not view the Civil Rights Act as an important issue for the agency.[12] And, in a 1983 follow-up study, "exasperated members of the U.S. Commission on Civil Rights ... depict[ed] the nondiscrimination laws and the EPA's implementing regulations as 'a cruel joke on minorities, women, the handicapped, the elderly and other traditional victims of prejudice.'"[13]

In July 1994, U.S. Attorney General Janet Reno, issued a memorandum on the enforcement of Title VI to heads of departments and agencies that provide federal financial assistance. This document was a reminder that "administrative regulations implementing Title VI apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect."[14] The memo concluded with the following statements:

> This Department is committed to productive and effective enforcement of the civil rights laws by each agency that extends Federal financial assistance. Facially neutral policies and practices that act as arbitrary and unnecessary barriers to equal opportunity must end. This was the goal of Title VI when it became law and it remains one of the highest priorities of this Administration.[15]

In accordance with this directive and the mandate of civil rights laws, EPA must challenge longstanding practices of siting environmental hazards in minority and poor communities, and it must target resources to cleaning up waste sites in a nondiscriminatory manner. Although President Clinton's Executive Order and the establishment of the Interagency Working Group are components of a response to environmental discrimination, the Clinton Administration must also hold the EPA and other federal departments and agencies accountable for civil rights enforcement. It is now time to translate rhetoric into action.

One recent noteworthy action is *U.S. v. Borden Chemicals and Plastics, Inc. et al*, C.A. No. 94-2592, (M.D. La). On October 27, 1994, the United States Government filed this suit in federal district court in Louisiana to compel Borden Chemicals and Plastics Limited Partnership and two related Borden Chemicals entities to clean up a release of carcinogenic and other contaminants into the groundwater at its Geismar, LA facility. The complaint charges that Borden failed to comply with the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Clean Air Act. The facility, which manufactures chemicals used for the production of plastic pipes and other plastic products, is located in a highly industrialized area on the Mississippi River with a predominantly African American population. In commenting on the lawsuit, EPA Administrator Carol Browner stated that:

> The Clinton Administration is committed to making sure that no company will realize unfair profits from polluting anywhere in the U.S., but particularly in minority and low-income communities that already face disproportionate risks.[17]

This is an example of the type of affirmative litigation that the federal government should be engaged in to promote equal protection under the law and environmental justice.

Endnotes

[1] *See generally U.S. Gen. Accounting Office, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* GAO/RCEO-83-168 (1983); *Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (1987); *Race and the Incidence of Environmental Hazards* (Bunyan Bryant & Paul Mohai eds., 1992); *Dumping in Dixie: Race, Class, and Environmental Quality* (Robert D. Bullard ed., 1990); and "Unequal Protection: The Racial Divide in Environmental Law," Natl. L.J., Sept. 21, 1992, at S1.

[2] Gerald Torres, "Environmental Burdens and Democratic Justice," 21 Fordham Urban Law Journal, 431, 433 n. 9 (1994).

[3] *Id.*

[4] *Id.*

[5] Robert M. Wolcott & Reina Milligan, "Findings and Recommendations of EPA's Environmental Equity Workgroup," EPA J., Mar./Apr. 1992, at 20.

[6] The Working Group consists of the heads of the following agencies and offices or their designees: Department of Defense; Department of Health and Human Services; Department of Housing and Urban Development; Department of Labor; Department of Agriculture; Department of Transportation; Department of Justice; Department of the Interior; Department of Commerce; Department of Energy; Environmental Protection Agency; Office of Management and Budget; Office of Science and Technology Policy; Office of the Deputy Assistant to the President for Environmental Policy; Office of the Assistant to the President for Domestic Policy; National Economic Council; Council of Economic Advisers; and such other Government officials as the President may designate.

[7] Torres, *supra* at 431.

[8] 42 U.S.C. § 2000d (1988).

[9] 40 C.F.R. § 7.35Cb).

[10] In *Guardians Ass'n. v. Civil Service Commission*, 463 U.S. 582, 591-04 (1983), the U.S. Supreme Court upheld Title VI regulations that prohibit the use of federal funds in ways that have any racially discriminatory effect; *see also id.* at 643 (Stevens, J., dissenting) (agreeing that regulations with an "effects" standard are valid means of effectuating Title VI).

[11] James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 Stanford Environmental Law Journal 125, 155 (1994), citing U.S. Environmental Protection Agency, A Preliminary Analysis of the Public Costs of Environmental Protection: 1981-2000 at 8 (1990).

[12] *Id.*at 173 (citing U.S. Environmental Protection Agency, FY1994 Civil Rights Implementation Plan Requirements at 7).

[13] U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. VI 14 (1975).

[14] "The Road Less Traveled", *supra* at 183 n. 281, citing U.S. Comm'n on Civil Rights, Federal Civil Rights Enforcement Efforts in Mid-America 43 (1983).

[15] Memorandum from the Attorney General to Heads of Departments and Agencies that Provide Federal Financial Assistance (July 14, 1991) (on file with author).

[16] *Id.*

[17] "U.S. Files Multi-Million Dollar Action Against Borden Chemicals and Plastics for Illegal Hazardous Waste Management Practices and for Cleanup of Contaminated Groundwater," Enforcement News, United States Department of Justice and United States Invornmnetal Protection Agency.

Chapter XIX

Minority Health Care Issues

by Maya Wiley

I. Introduction

Poor health status among minorities is a national disgrace. In part, poor health status is related to poverty itself. Minorities are disproportionately poor and poor people are more likely to be exposed to unhealthy environmental conditions, such as substandard housing and environmental insults. In addition, they are more likely to have poor nutrition and inadequate access to necessary health care services.

Because poverty plays a significant role in the health of communities of color, it is imperative that this Administration pursue civil rights compliance and enforcement more broadly than previous Administrations. The Administration must examine poverty programs closely for their impact on minority communities and the U.S. Department of Health & Human Services (HHS) as a whole, not just the Office for Civil Rights (OCR), must incorporate goals of equal access in its daily work.

The Clinton Administration has demonstrated a greater concern for the health of Americans, including the health of people of color, than any recent Administration. It has demonstrated this commitment in both its attempt to establish a right to health care through federal reform legislation and in some of the activities of HHS. While the Administration's commitment to the enforcement of civil rights in the health care delivery system is palpable, there are many important steps that it has not taken or has not completed.

After analyzing the need for, and barriers to, health care services experienced by people of color, this paper will examine the work of the OCR and the Health Care Financing Administration (HCFA). It will review the OCR's work on data collection, its responsiveness to specific civil rights complaints, and its efforts to ensure that bilingual services are provided to the Limited English Proficient (LEP).

This article will also review the importance of institutionalizing civil rights reviews outside of the OCR, by examining the need for civil rights compliance work at HCFA, because HCFA disburses billions of federal dollars every year for Medicaid and Medicare services, on which minorities rely disproportionately.

II. The Need for Health Services

A. Health Status in Communities of Color

Minorities in the United States are in poorer health than white Americans and are more likely to die from preventable diseases and illnesses than are whites. The six leading causes of death in minority communities include heart disease and stroke, homicide and accidents, cancer, infant mortality, cirrhosis, and diabetes.[1] These six causes of death account for 80% of excess deaths among African Americans.[2] However, the incidence of specific disease is dramatically different between racial and ethnic groups and must be analyzed separately.[3]

1. Infant Mortality

An important measure of health status in any community is the survival rate of its infants. African American infants die before reaching their first birthday at twice the rate of white infants[4] and African Americans experience the highest infant mortality rate in the nation. American Indians experience the second highest rate of infant mortality, while Puerto Ricans and Mexican Americans experience the third and fourth highest incidence of infant mortality, respectively.[5]

2. Cancer

Cancer accounts for much of the excess deaths in many minority groups. Cancer is a particularly serious problem in the African American community. For example, breast cancer is the leading killer of African American women between the ages of 15 and 54 and cervical cancer is the number two killer of African American women between the ages of 15 and 34. African American women develop cervical cancer at three times the rate of white women and African American women's rate of death from cervical cancer has increased while that of white women has decreased.[6]

After African Americans, Hawaiians have the second highest incidence of cancer and experience excess deaths from breast and lung cancers.[7] Latinos have an excess incidence of certain cancers: stomach, prostate, esophagus, pancreas, and cervix cancers. Latinos experience twice the rate of stomach cancer as non-minorities.[8]

Native Americans, on the other hand, have the lowest overall mortality rates from cancer. However, cancer is the third most common cause of death among Native Americans, after accidents and heart disease, respectively.[9]

3. Heart Disease and Stroke

Coronary artery disease and stroke are the leading cause of death among African Americans.[10] It is also a major cause of death among Latinos, although the rate is lower than that of whites.[11] While heart disease is the leading cause of death for all Asian American/Pacific Islander groups, their risk of mortality from most cardiovascular diseases is lower than for other minorities and whites, with the exception of stroke. Their rates of mortality due to stroke are generally similar to that of whites.[12] Heart disease is a significant contributor to all-cause mortality in Native Americans, but is proportionately less of a contributor than in the general population.[13]

4. Diabetes

While the prevalence of diabetes in African Americans is 1.6 times that of whites, the rates are twice as high for Mexican Americans and Puerto Ricans as compared to whites.[14]

5. AIDS

While AIDS is not a primary cause of death in minority communities, AIDS nevertheless poses a grave health threat. Between 1981 and 1988, 50,830 cases of AIDS were reported in the United States. Of those reported with the disease, 25.5% were African American, 12.9% were Latino and .7% were "other." These figures are staggering when one considers that African Americans represented only 11.5% of the population and Latinos represented only 6.4% of the population. Thus, both groups became infected at twice the rate of their representation in the general population. Overall, the risk of AIDS infection among African American and Latinos was almost three times as great as that among whites.[15] While the overall incidence of AIDS in Asian Pacific Amercian communities has been relatively low, in metropolitan areas such as San Francisco and Los Angeles with large concentrations of Asian Pacific Americans, they have the highest rate of increase in reported AIDS cases when compared with other racial/ethnic groups.[16]

B. Poverty in Communities of Color

Wealth is a correlate of health status. Generally speaking, the poorer the individual, the more likely his/her health status will also be poorer.[17] African Americans and Latinos are significantly overrepresented among Americans living below the poverty level. While Latinos represent 8.9% of the population, they represent 29.3% of those who live below the poverty level. Similarly, African Americans represent 12.6% of the population, yet they represent 33.3% of those who live below the poverty level.[18] "Other races" are 4.7% of the population of those who live below poverty.[19] The overall poverty rate for Asian Pacific Americans was one and one-half times that of non-Hispanic whites. However, poverty levels vary considerably among Asian Pacific ethnic groups. For example, 46% of Southeast Asians, 25% of Vietnamese, and 20% of Pacific Islanders in this country are below poverty level.[20]

In 1993 the unemployment rate in the African American community was 12.9% and 11.7% for American Samoans, Native Americans, Asians and Black Latinos, while it was 6% for whites.[21]

C. Lack of Access to Health Care Services

Poor health and higher mortality rates among people of color are due, in part, to the lack of adequate and accessible health care services in their communities. The problem is exacerbated by the poverty extant in these communities. Many people of color simply cannot afford to pay for health care services. Access to a regular care provider is a good predictor of health care utilization, continuity of care and improved health outcomes.[22] Yet, many people of color simply do not have a regular physician because they cannot afford one.

African Americans and Latinos are less likely to have a primary care provider than are whites. Both groups disproportionately rely on hospital outpatient departments or emergency rooms for care compared to whites, a source of care that results in lower utilization rates. In 1982, 20% of African Americans and 12% of Latinos relied on hospital outpatient or emergency room care compared to 8% of whites. Asian Pacific Americans are also frequent users of hospital emergency rooms.[23] That same year 79% of whites had a regular doctor, but only 67% of African Americans did. Seventy-two percent of Latinos reported having a regular doctor.

Not surprisingly, African Americans and Latinos generally experience longer waiting times for care. Twenty-nine percent of Latinos and 23% of African Americans waited more than 30 minutes for care in 1982, compared to 15% of whites.[24]

Because minorities are more likely to be poor, they are less likely to have adequate health insurance. For example, in 1985 almost 20% of African Americans did not have health insurance.[25] Asian Pacific Americans are among the groups least likely to have access to employer-provided health benefits or to have health insurance. A 1985 survey conducted by the Boston Redevelopment Authority found that 27% of Asian Pacific Americans and 27% of Hispanics lacked insurance. A 1989 California study showed that 20% of non-elderly Asian Pacific Americans did not have employer-provided health benefits.[26] While lack of health insurance explains why many minorities do not have a regular care provider, it is only part of the story.

Medicaid recipients do not always receive mandated services, although they are insured. One in six beneficiaries, approximately two million adults, have great difficulty obtaining health care from a hospital or doctor because the providers will not accept Medicaid as payment. One in five Medicaid beneficiaries, approximately 2.3 million adults, seek care in an emergency room because they cannot find a regular doctor who will treat them in the office. Underservice of Medicaid recipients is due, in part, to the program's low reimbursement rates.[27]

Underservice is a particular problem in inner-city communities where African Americans and other minorities tend to live.[28] Seventy-eight percent of the underserved live in metropolitan areas.[29]

Harlem provides a poignant example of the intersection between poverty, ill health and lack of access to health care services. In 1985 the median household income for Central Harlem was about $12,000 a year and almost 70% of Central Harlem households earned incomes under $15,000 a year.[30] Almost half of pregnant women living in Central and West Harlem receive little or no prenatal care, although many of them are Medicaid eligible.[31]

In 1988 only 107 primary care physicians practiced full-time in Central and West Harlem to serve a population of more than 1.5 million people.[32] Thus, there is one full-time primary care doctor for every 14,019 residents of Central and West Harlem.[33]

The number of doctors available to a community is not the only measure of whether access to health care services is adequate.[34] An indispensable component of adequate primary care is the doctor's ability to admit a patient to a hospital, follow the patient's treatment there, and coordinate aftercare. Without admitting privileges, the doctor can only send his or her patient to a hospital emergency room for inpatient hospital care and cannot monitor the patient's progress once hospitalized.[35] Yet, many African American doctors in Harlem do not have admitting privileges.[36]

While people of color rely disproportionately on hospitals for health care, fewer and fewer facilities are available in minority communities. African American communities rely largely on public, not-for-profit hospitals and traditionally African American hospitals to serve them. However, these facilities are disappearing. By 1979, 210 hospitals serving poor communities either closed or relocated, taking 30,000 hospital beds from these communities. A disproportionate number of these hospitals were located in neighborhoods in which African Americans represented 60% of the population and served twice as many minority and Medicaid patients as other facilities.[37]

III. History of Civil Rights Enforcement in Health

It is important to place any discussion of this Administration's record of civil rights enforcement in health care in a historical context. Historically, the U.S. Department of Health, Education & Welfare's (HEW) Office for Civil Rights (OCR) had primary enforcement of civil rights laws applicable to the health care delivery system. From Title VI's passage until the mid 1970s, HEW's OCR expended only limited resources on civil rights enforcement in health care; education had been OCR's priority area.[38] Most of the OCR's initial civil rights enforcement work focused on the certification of Medicare participating facilities and there it did an inadequate job.[39] In addition, the OCR was criticized frequently by the U.S. Civil Rights Commission for its slowness and inefficiency in handling complaints.[40]

When HEW was broken up into separate agencies and HHS was created, enforcement of civil rights laws in the area of health became the primary responsibility of the OCR at HHS. While HHS's OCR new focus was primarily civil rights in health care, it did not greatly improve its civil rights record.

In 1987 the House Committee on Government Operations issued a critical report on OCR's performance after conducting an oversight investigation.[41] The report found that the OCR unnecessarily delayed case processing; its voluntary compliance agreements were insufficient to achieve compliance with Federal civil rights laws and did not secure adequate remedies; compliance agreements were not monitored; investigations were superficial and inadequate; and OCR did not assure that HHS policies were consistent with civil rights laws. In short, this Administration inherited a directionless and ineffective OCR at HHS.

IV. Relevant Civil Rights Laws

The primary civil rights statutes that prohibit discrimination in health care delivery based on race and national origin are Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its supporting regulations, 45 C.F.R. § 80 *et seq*, and the Hospital Survey and Construction Act of 1946 (Hill-Burton Act), 42 U.S.C. § 291 *et seq.*, and its supporting regulations, 42 C.F.R. § 124 *et seq*.[42]

A. Title VI of the Civil Rights Act of 1964

Title VI prohibits discrimination by federal fund recipients on the basis of race, color, or national origin. Its regulations establish a disparate impact standard. Prohibited activities include: (1) denial of a service to protected persons; (2) provision of different services to protected persons; (3) provision of segregated or separate treatment; and

(4) different treatment of protected persons in admissions or enrollment practices.[43] In addition, the siting or location of facilities is also actionable.[44]

The HHS must conduct reviews of practices of recipients to determine whether they are complying with Title VI.[45] If a violation is found through a compliance review or upon investigation of a complaint, the agency must try to resolve the violation informally.[46] However, if it is not resolved informally, the agency may suspend, terminate or refuse to grant continued financial assistance.[47] The matter can also be referred to the U.S. Attorney General for further action.[48]

Title VI is applicable to much of the health care delivery system in this country, because it is largely funded with federal dollars. In today's health care delivery system there is no such thing as a health provider that receives no federal financial assistance in some form. In fact, much of the federal funding of health providers comes in the form of direct subsidies.

Health care expenditures accounted for $195 billion federal dollars in 1993 and were 13% of the total federal expenditures.[49] That figure has and will continue to grow. One third of the money spent on health care in the United States is a federal subsidy to a health care provider.[50] Recipients of federal health dollars include states, hospitals, nursing homes, clinics, substance abuse centers, and private doctors. Federal dollars pay for 41% of all hospital care, 32% of all nursing home care, and 28% of doctors' fees.[51]

The major expenditures in the area of health are made in the Medicaid and Medicare programs. In 1992 the federal government spent $67 billion on medical payments in the Medicaid program.[52] In 1993 the federal government spent almost $143 billion for services in the Medicare program.[53]

B. The Hill-Burton Act

Under the Hill-Burton Act the federal government appropriated funds for hospitals, or other facilities (e.g., nursing homes) from 1946 through the 1970s to construct or modernize physical plants. Fund recipients are required to provide services to all persons residing in the community without regard to race or reliance on third party payor programs like Medicaid and Medicare.

Congress enacted the Hill-Burton Act to address the inadequate distribution of health care services in medically underserved areas by assisting states in constructing and modernizing public and not-for-profit hospitals in low-income and minority communities.[54] Congress recognized that low-income and minority communities did not have sufficient access to health care services.[55] As a result, in determining which facilities should receive federal financial assistance, Congress expected recipients to consider the economic status of community residents, transportation problems experienced by the community, and cultural and linguistic barriers that might influence the use of health services by community residents.[56]

The community service obligations of the Hill-Burton Act exist in the form of regulations promulgated under the Act and require that:

> a facility ... make the services provided in the facility ... available to all persons residing... in the facility's service area without discrimination on the ground of race, color, national origin, creed, or any other ground unrelated to an individual's need for the service or the availability of the needed service in the facility.[57]

The regulations also create an affirmative obligation on the part of recipient facilities to insure that Medicaid beneficiaries receive access to its services. The regulations state:

> The facility shall take any necessary steps to insure that admission to and services of the facility are available to beneficiaries of the governmental programs [e.g., Medicaid] without discrimination or preference because they are beneficiaries of those programs.[58]

The regulations prohibit discrimination against Medicaid patients, patient dumping practices, discrimination in staffing privileges or other admissions practices that may deny access.[59]

Most hospitals in the United States have received Hill-Burton funds. HHS estimates that

5,066 facilities nationwide are currently subject to the community service obligations of the Hill-Burton Act.[60]

V. OCR Compliance & Enforcement

A. Data Collection

Collection of data sufficient to determine compliance with Title VI is one of the most fundamental components of any meaningful Title VI enforcement or compliance effort. The Attorney General was required to promulgate minimum requirements for implementation of Title VI by federal agencies.[61] Regulations promulgated by the Attorney General require federal agencies to provide for the collection of data and information from applicants for and recipients of federal assistance sufficient to permit effective enforcement of Title VI.[62]

HHS's Title VI regulations provide that each recipient of HHS funds keep records and submit "timely, complete, and accurate compliance reports" that the agency may require.[63] Notwithstanding the Attorney General's mandate or its own regulations, HHS has never provided for the systematic collection of race-based data, sufficient for effective enforcement of Title VI.[64]

To implement its data collection authority with regard to the Medicaid program, HCFA requires states to report Medicaid cost and programmatic information based on data from their Medicaid Management Information Systems (MMISS). MMISS are state automated claims processing and information retrieval systems.[65] Using data from MMISS, states must submit a statistical report, known as the HCFA-2082, on medical care eligibles, recipients, payments, and services. In this report, states must provide utilization information that includes data on race and ethnicity and sex.[66] However, this race and ethnicity data only captures ethnicity in overgeneralized terms. The report collects data on "Hispanics" and "Asians," not on Puerto Ricans, Mexican Americans, Cuban Americans, Chinese Americans, Korean Americans, Japanese Americans, etc.[67]

The report does provide information on the provider or providers who treated the patient, but it does not provide information on the race of patients treated by particular providers or the services provided by race. This is extremely important information. A hospital may be located in a predominantly minority community, but have a relatively small minority patient population. In addition, members of the minority patient population may not receive the same services as their white counterparts. This type of utilization information would help HHS determine where Title VI or Hill-Burton compliance reviews may be necessary.

In order to determine utilization patterns by race and provider, one must cross-match this data with Medicaid claims data records. However, data submitted by states is often inaccurate, inconsistent, and incomplete.[68] Furthermore, HHS does not cross-match routinely. If nongovernmental organizations seek this data, they must conduct costly special computer runs that will not necessarily provide "clean" data.

In addition, the MMISS does not allow for the collection of data on non-Medicaid patients treated by federal fund recipients. Title VI prohibits an entire entity from discrimination on the basis of race, even if only a small sub-part of the entity receives federal funds.[69]

The only other major HHS database that provides some information relevant to utilization of health services is the MEDPARS system of the Medicare program. However, MEDPARS does not provide data by race and national origin; it only collects claims data for elderly Medicare eligibles. Theoretically, this claims data could be cross-matched with data collected by the Social Security Administration (SSA) from persons who apply for Social Security cards. Obviously, however, there are many problems in relying on Social Security enrollment data for cross-matching purposes. For example, persons who are not legal residents or who are infants may not have applied for a Social Security card.

Furthermore, until 1982, SSA captured race data for "white, black" and "other" only. Appropriate data on the Latino and Asian American/Pacific Islander and Native American and Alaska Native populations could not be captured for anyone who applied for a Social Security card prior to 1982. Currently, race and national origin data is collected for broad categories that may not be useful, such as "Hispanic." Slightly more refined data is collected for other groups, e.g., "Asian or Pacific Islander" and "Native American or Alaska Native," but these categories may still not be sufficiently refined.

Shortly before this Administration took office, an African American woman and a predominantly African American unincorporated association filed suit against HHS for failure to require federal fund recipients to record and report data sufficient to determine utilization of federally funded services by provider.[70]

As a result of that lawsuit, the OCR has examined the possibility of cross-referencing existing databases to produce data on the utilization of services by race and national origin. It has initiated a good faith effort to collect race-based data, and the effort may increase the amount and accessibility of utilization data for the Medicaid population. However, the effort will not yield data sufficient to determine compliance with Title VI. Data will not be collected on race-based utilization by non-Medicaid recipients. Furthermore, the data collected will not contain useful information for all racial groups and the data may not always be accurate.

Many members of the civil rights community, as well as the plaintiffs in the pending lawsuit, asked that HHS alter the health care provider billing form to include race and national origin data. This form, known as the UB-92 or HCFA-1450, is used widely by institutions such as hospitals to bill for services. A substantially similar form, the HCFA 1500, is used by individual practitioners. The health care industry uses the same form for Medicaid and private pay purposes. Therefore, if the form contained a race and national origin cell, it would capture a broader population than would Medicaid or Medicare data.

It is critical for adequate civil rights enforcement that a person who may be aggrieved under Title VI be able to make comparisons of utilization by payor status and race. However, this Administration has refused to alter the UB-92 and has created no plan to collect data on patient utilization of funded programs who are not Medicaid or Medicare patients.[71]

B. Specific Cases

Because the OCR has had a long history of mishandling civil rights complaints, a measure of the success of this Administration in enforcing civil rights must necessarily include how it handles such complaints. Since this Administration has taken office, one major race based civil rights lawsuit on access to health care services, *Lattimore et al. vs. County of Contra Costa, et al.*, has been concluded by one of the OCR's regional offices. Individuals and churches challenged under Title VI the rebuilding of a county public hospital in a location inaccessible to many African Americans, Latinos and Asian Americans, and Pacific Islanders. Plaintiffs also challenged the quality of the hospital's services, including its scope of services, conditions of the physical plant, waiting times, and staffing levels of the clinics operated by the hospital. The action alleged both intentional and disparate impact discrimination.

The portion of the County in which the hospital is located has a greater concentration of white Medicaid patients than more distant parts of the county. A great majority of the persons of color who rely disproportionately on the state's Medicaid program (Medi-Cal) reside far from the facility. There is insufficient public transportation to the hospital and that distance has a deterrent affect on care seeking behavior of minorities.

The OCR's Region IX office found the County to be in compliance with Title VI. In its ruling, Region IX departed from Ninth Circuit precedent on the disparate impact standard. Specifically, it determined compliance by relying on general population statistics, rather than the demographics of the Medi-Cal population. It compared the percentage of patients by race who utilized the hospital to the percentage of the general population by race in the county. However, the relevant comparison was the racial demographics of the hospital's patients as compared to the Medi-Cal population; the hospital principally serves Medi-Cal patients.

Plaintiffs filed a motion for preliminary injunction with the U.S. District Court for the Northern District of California.[72] The court granted the motion based on the proper Title VI disparate impact standard.

The Region IX ruling demonstrates a continuation of some of the problems identified in 1987 by the House Committee on Government Operations. It is a matter of great concern that the OCR's complaint review process continues to be unreliable.

Nevertheless, some positive developments have occurred. The OCR in Washington vacated the Region IX ruling and is reconsidering the decision. It is unclear, however, how efficient and accurate that review will be. Without quick and efficient resolution of a complaint that seeks to avert great harm to low income people of color, it may be more difficult to craft a meaningful remedy. In the context of health, harm suffered by a complainant may include deterioration of health or even death. Furthermore, in the case of facility construction, if action is not taken quickly, the equities may not balance in favor of new or additional construction to correct the violation. Accordingly, a legal victory that arrives slowly may only yield a symbolic victory.

Unfortunately, the speed with which OCR has addressed pending matters filed prior to this Administration does not provide great hope for efficiency. *Ms. G. v. St. Luke's Roosevelt Hospital Center* provides a distressing example. Complainants filed the OCR complaint in April 1991 under both the Hill-Burton Act and Title VI. The suit challenged a New York City hospital's decision to close all maternal and child care services at its facility in Harlem and open those services in its mid-town Manhattan facility. The Harlem facility had a predominantly Medicaid, Latino, and African American patient population. The mid-town facility served a significantly larger white and private pay population in a gentrifying neighborhood. Hospital construction was taking place to accommodate the service reconfiguration when the matter was filed.

The Bush Administration allowed this case to languish without decision, although the investigation had been concluded. The Clinton Administration re-opened the investigation. However, the OCR has not, to date, ruled on the complaint. Since the matter was filed, the facility has significantly reduced some of the services at issue and has completed most of the construction. This reduction of services occurred during the tenure of the current Administration.

It appears that the OCR has concluded its investigation. Moreover, OCR has apparently looked for outside expert analysis to help determine the outcome. These are positive signs. However, even assuming a favorable ruling, it is not clear whether the OCR will be able to craft a remedy that will be meaningful.

Some case work of the OCR has demonstrated sincere concern for the treatment of minorities by health care providers. The OCR has become involved in major cases that are extremely important to minorities, particularly minority women. These matters include the segregation of hospital wards at Mt. Sinai Hospital in New York City, and a Florida hospital's referral of minority pregnant drug addicts for criminal prosecutions. At this point, the success of this Administration's case-specific efforts is mixed.

Another reason for inadequate civil rights enforcement is that the Justice Department dedicates precious few resources to civil rights enforcement in the health care delivery system. Except for the section devoted to the enforcement of the Americans with Disabilities Act, the Department has no developed program for Title VI or Hill-Burton Act enforcement. A more developed and institutionalized approach to civil rights violations in the area of health on the part of the Justice Department would improve compliance and enforcement efforts.

C. Bilingual Services Regulations

This Administration has demonstrated concern for National Origin Minorities, particularly with regard to those who are monolingual or Limited English Proficient (LEP). In the early 1980s, a task force at the OCR recommended that HHS adopt rules on Title VI enforcement and the availability of services for LEP patients in federally funded facilities. However, that recommendation languished during the Reagan and Bush Administrations. This Administration decided to re-examine the need for bilingual services regulations.

According to 1990 census data, 31 million persons over 5 years of age speak a language other than English at home — 13.8% of this nation's population. Of these persons, 43% identify themselves as not speaking English very well. A majority of those who speak a first language other than English, 55%, are Spanish-speakers. More than eight million persons identify themselves as LEP.[73] Two out of every three Asian Pacific Americans do not have English as their primary language: more than 2.3 million do not speak English well.[74]

People with limited proficiency in English often do not have access to routine preventative care and are turned away from hospitals, or are misdiagonsed and give delayed second-class care, often with serious or even fatal consequences.[75] For example, an American citizen of Latin American descent died three hours after arriving at a hospital emergency room with stab wounds. A doctor inquired about his insurance and immigration status, but his wife spoke only Spanish and could not communicate with the doctor.[76] In one San Diego study, 60% of the Southeast Asian refugees interviewed cited lack of English proficiency as a major obstacle to seeking health care.[77]

LEP populations may not be aware of services available to them because materials are printed in English and personnel are unable to answer even basic questions of those eligible, because they cannot speak the language. Forms for benefits are also in English. Furthermore, those LEP patients who have actually received health services often receive lower quality services. They may be subject to long delays, inaccurate diagnoses, treatment and placement, inadequate instructions on their health maintenance and violations of patient confidentiality rights.

The Supreme Court has recognized that language discrimination may be used as a proxy for national origin discrimination. In *Lau v. Nichols*, the Supreme Court unanimously found that a school district's failure to provide bilingual services to Chinese students violated Title VI.

HHS is considering regulations that would prohibit a federal fund recipient from providing more limited services and lower quality services to the LEP population than to those provided to other patient populations. Unreasonably delaying services and requiring LEP patients to provide or pay for their own interpreters would also be prohibited. Finally, services would be required to be as effective for LEP patients as they are for other patients.

Such regulations are critical to assure that National Origin Minorities actually learn of the health services for which they are eligible and receive the services in a timely and effective manner. These regulations must be issued immediately. While the Administration has demonstrated appropriate concern for LEP populations by resurrecting consideration of these proposed regulations, it is not yet clear whether the regulations will be adopted.

D. Medicare Part B

Medicare Part A provides inpatient hospital services to Medicare recipients. It is expressly included in HHS's illustrative, non-exclusive list[78] of programs covered by Title VI.[79] Medicare Part B, on the other hand, is an optional insurance program. If an eligible person chooses to participate, she pays part of the premium for physician services or outpatient hospital services. The remainder of the premium costs are paid from general federal funds.[80] More than two-thirds of the Medicare Part B program is funded with general federal funds.[81]

Nonetheless, HHS has taken the position that Title VI does not apply to the services provided under Medicare Part B.[82] It makes two arguments to support this exemption.

First, HHS argues that federal dollars in the Medicare Part B program do not constitute federal financial assistance to the providers because the benefits are paid directly to Medicare eligibles.[83] This argument is embodied both in guidelines and in regulations it promulgated under § 504 of the Rehabilitation Act of 1973.[84]

This construction of the "recipient" of federal payments is a fiction. The federal share of funds that pays providers for covered services under the Medicare Part B program is a significant portion of the funding. That the funds pass through the hands of the Medicare patient before reaching the provider should not change the character of the federal funds received by the provider.[85]

Second, HHS argues that Medicare Part B is a contract of insurance exempt from Title VI coverage,[86] although it does not consider the Medicaid program to be contractual in nature. There is no cogent explanation to treat the Medicare Part B program differently from Medicare Part A or Medicaid. Moreover, the legislative history of Title VI and the Medicare Act suggests that Medicare Part B should be exempt from Title VI coverage. Furthermore, no evidence exists that Congress intended the "contract of insurance" exemption to extend to the Medicare Part B program. The legislative history of Title VI suggests that only a limited range of contracts of insurance are exempt from coverage. The exemption exists for contracts involving insurance or guarantee programs in housing or the operations of banks or savings and loans associations.

To date, this Administration has taken no steps to alter any Manuals or to begin a rule-making process to change the § 504 Rehabilitation Act regulation.

The health reform debate demonstrated the importance of revising these legally insupportable interpretations of Title VI. Many of the major health reform bills considered by Congress, including the Administration's proposal, would have ended the Medicaid program as it is currently constituted. The funds would have been commingled with employer contributions and individual contributions to premium payments. As a result, almost all premiums and health service reimbursements would have been paid with commingled funds for Medicaid eligibles and non-Medicaid eligibles alike.

Such a reimbursement program could be considered an exempt contract of insurance given the similarity of the payment system with that of the Medicare Part B program. Thus, a significant portion of the health care program could conceivably have been exempt from Title VI coverage under HHS analyses.

Simply put, HHS interpretation of Medicare Part B is inconsistent with existing interpretations of "federal financial assistance."

IV. Health Care Financing Administration

A. Waivers from Medicaid Act Requirements

Some of the most important civil rights compliance work must be done outside of the OCR. The OCR has neither the staff nor the ability to review daily decisions made by HHS to determine whether recipients of federal dollars are complying with Title VI or the Hill-Burton Act. As a result, the measure of effectiveness of any Administration's civil rights compliance and enforcement in health requires institutionalizing such work within key divisions of HHS. It is impossible to catalogue all of the areas in which such oversight could be institutionalized, but some key examples of HCFA's work provides a poignant example.

This Administration's efforts to reform this nation's health care system and ensure "universal" health coverage prompted some states to act before Congress to reform their state health care delivery systems. Many states have or are considering seeking waivers to Medicaid Act requirements in order to experiment with new forms of health care delivery. HCFA has primary authority to review and approve such waivers.[87] In 1993 alone, HCFA granted five broad waivers from Medicaid Act requirements.[88]

The Medicaid Act waivers are important from a civil rights enforcement perspective because, if granted, the state systems they permit may greatly alter the way that Medicaid services are delivered in a state. The purpose of the Secretary's discretion to waive Medicaid Act requirements is to enable states the flexibility to experiment with new or different approaches to the delivery of health care services or to adapt programs to the special needs of particular areas or to particular groups of recipients.[89] Because the Medicaid population is disproportionately minority, it is vital that reviews of waiver requests include examination of the request for its impact on minorities and compliance with federal civil rights laws.

The waiver process provides an opportunity to identify potential problems with a state's public health care program, before permitting implementation, thereby reducing civil rights violations and assuring greater access to covered health care services for minorities. However, HCFA has not reviewed any state waiver request for its impact on minorities or the civil rights implications of the waiver requests.

There are various types of waivers from Medicaid Act requirements that a state may seek.[90] However, the most sweeping is known as a §1115 waiver, which authorizes the Secretary to waive a broad array of federal requirements at her discretion.[91] A state may also request narrower waivers, including a waiver of specific requirements of the Medicaid Act,[92] or impose cost-sharing on recipients for non-emergency use of emergency services.[93]

Section 1115 waivers are the broadest that the Secretary may grant, because a state may request that the Secretary waive many more requirements than may be waived under the other waiver provisions. Yet HHS has promulgated no regulations that describe what a state must provide in order to obtain such a waiver or how HCFA should evaluate such ambitious, sweeping statewide experiments.

HCFA has 1984 guidelines governing waiver requests, which require definable, measurable hypotheses for the demonstration project, evidence that the project can be implemented successfully and that local community support exists, and a projection of the impact on Medicaid recipients.[94] However, the 1984 guidelines do not even mention impact on minorities and compliance with federal civil rights laws, *let al*one describe sufficient criteria to evaluate drastic changes in the delivery system.

This Administration determined that such requests should be approved more quickly and easily than would be permitted under the cursory and inadequate 1984 guidelines. The initiative has resulted in the approval of waiver requests that create mandatory managed care programs for low-income people (who are disproportionately minority) that have no federal requirements for the provision of care to Medicaid and low-income patients. In addition, the initative has endangered existing health care infrastructure in underserved minority communities, including migrant and community health centers and other clinics, as well as individual practitioners. Tennessee's health reform program provides an example of the problems that may be caused by such waivers.

1. Tennessee Case Study

Tennessee received a §1115 waiver to institute its health reform program known as "TennCare." TennCare requires that all Medicaid recipients be enrolled in mandatory managed care plans. It also makes the mandatory managed care plans available to the uninsured.

In Tennessee, Medicaid recipients have been grossly underserved. Almost half of all births in Tennessee are to women on Medicaid. More than 30% of African American women of child bearing age in Tennessee are Medicaid recipients, although African Americans make up only 15% of the population. In 1988 Tennessee had the twelfth highest infant mortality rate in the nation and had more infant deaths than Costa Rica, Bulgaria, Hungary, Cuba, Hong Kong, Jamaica, Poland, and Singapore. Between 1985 and 1989, the infant mortality rate for African Americans was more than twice the rate for whites in Tennessee.[95]

Such appalling statistics are not necessarily surprising, since a pregnant Medicaid recipient would often wait months for her first prenatal care appointment. As a result, poor women in Tennessee were receiving little to no prenatal care as a direct result of the state's failure to comply with Medicaid Act requirements. Specifically, the Act required the state to ensure that poor pregnant women had the same access to health services as women in the general population, a requirement known as the equal access provision.[96]

In its waiver request to create TennCare, the state promised to extend insurance coverage to many of Tennessee's uninsured, who are not eligible for Medicaid benefits under the Act's provisions. The new program would continue to be funded with Medicaid funds, but would no longer be referred to as a Medicaid program. All individuals below the poverty level would obtain Medicaid funded services without cost. Those between 100% and 200% of the federal poverty level would receive coverage but would pay deductibles, co-payments and premiums on a sliding fee scale. Those with incomes above 300% of poverty would be subject to full cost sharing requirements.

TennCare would provide a basic benefits package similar to the benefits package offered to state employees. Any provider that chose to participate in the state employee network would also be required to participate in the TennCare network. Within three years, participating providers would be paid on a capitated basis as Health Maintenance Organizations.

Currently, Blue Cross/Blue Shield, as the major statewide managed care network, will serve the lion's share of the TennCare population, even though it may not have sufficient infrastructure in all portions of the state. Tennessee was not required to determine how existing programs that provide needed services to poor minorities would fare or whether they would be replaced with equally effective programs.

Moreover, a physician "boycott" of the TennCare program and lawsuit filed by the Tennessee Medical Association challenging the waiver has meant that many providers will turn TennCare patients away. As a result, access to health services may not have increased on a level supposed by the waiver application. Tennessee's example demonstrates why the 1984 guideline requirement of community support is important.

Furthermore, migrant and community health centers—important health care providers in underserved communities—are no longer reimbursed for the full range of services they provide and are no longer reimbursed at reasonable cost rates, threatening their very existence.[97] Meanwhile, some patients enrolling in managed care plans, such as Blue Cross/Blue Shield, may not have accessible health care providers that are part of the HMO in their community, and the traditional providers who served them may not be reimbursed for their care.

If HCFA had appropriate regulations or guidelines for the evaluation of § 1115 waivers, improvements in the TennCare program might have been possible.

V. Recommendations

1) HHS should alter the HCFA 1450 and 1500 to collect race-based data. HHS should collect, analyze and make publicly available the data. In addition, HHS should require states to improve MMISS data collection, cross-match the data, and make it publicly available.
2) The OCR, in conjunction with the Justice Department, must train regional office investigators and staff in the proper standards for Title VI enforcement, including the proper questions to ask a subject of investigation and the proper ways to gather information. In addition, OCR should develop guidelines for the efficient and timely determination of complaints.
3) The Clinton Administration should ensure the adoption of the proposed bilingual service regulations.
4) HHS should expand the 1984 Guidelines governing review of § 1115 waiver requests to include evaluation of the effect of such waivers on access to services for minorities and Medicaid patients and should explicitly include civil rights compliance and enforcement reviews.

Certain Medicaid Act protections should not be waived, including the equal access provisions. If the state does not devise a demonstration project calculated to increase access to services for the underserved, HCFA should deny the waiver. No requirements that protect existing infrastructure in low-income communities, such as the requirements relating to Federally Qualified Health Centers (FQHC), should be waived. FQHCs must be reimbursed 100% of reasonable costs of the health services they provide.

Moreover, when a state seeks waivers, HCFA should be required to analyze recipients' (particularly those who are racial and ethnic minorities) current access to care and services. If recipients do not have the same access to care and services as the privately insured population, HCFA must require that the state create mechanisms that will seek to increase the current number of participating providers to underserved communities under its demonstration project.

5) The Justice Department should create a section within the Civil Rights Division for the express purpose of seeking out and prosecuting civil rights violations in the health care delivery system.

Endnotes

[1] U.S. Department of Health & Human Services, *Report of the Secretary's Task Force on Black & Minority Health* [hereinafter: "Black & Minority Health Vol. I Vol. I"], Vol. I, (August 1985) 64-68.

[2] Excess deaths express the difference between the number of deaths actually observed among African Americans and the number of deaths that would have occurred if African Americans experienced the same death rates as whites. *Id.* at 69-74.

[3] There is less data available on the health status for minority groups other than African Americans. It is difficult to get national statistics for some ethnic groups.

[4] *Health and Medical Care of Africans Americans: Assessment of the Status of African Americans* [hereinafter: "Health and Medical Care"], Vol. V., William Monroe Trotter Institute, University of Massachusetts at Boston (1992) at 39.

[5] U.S. Department of Health & Human Services, *Health United States 1990* [hereinafter: "Health"], at 11. Cuban, Chinese, Japanese and Filipino Americans have lower incidence of infant mortality than whites.

[6] American Cancer Society, *Cancer Facts and Figures for Minority Americans*, 1991, pg. 15.

[7] *Id.* at 96. Cancer rates vary widely among Americans of Chinese, Japanese, Filipino, and Hawaiian descent. The incidence for Chinese, Japanese, and Filipinos are lower than for non-minorities, although the rates of cancer for Chinese Americans and Japanese Americans is increasing.

[8] Black and Minority Health Vol. I, *supra* note 1, at 94.

[9] *Id.* at 97.

[10] Health and Medical Care, *supra* note 4, at 5, 12.

[11] Black & Minority Health Vol. I, *supra*, note 1, at 114.

[12] *Id.* at 115-16.

[13] *Id.* at 117.

[14] *Health United States 1990*, U.S. Department of Health & Human Services, 26.

[15] R. Selik, K. Castro & M. Pappaioanou, *Racial/Ethnic Differences in the Risk of AIDS in the United States*, 78 AMERICAN JOURNAL OF PUBLIC HEALTH 1539 (December 1988).

[16] Confronting Critical Helath Issues of Asian and Pacific Islander Americans, ed. by Nolan Zane, David Takeuchi, Kathleen Young, "Acquired Immunodeficiency Syndrome" by Tery S. Gock, p. 252 (1994)

[17] U.S. Department of Health & Human Services, *Health Status of Minorities and Low Income Groups*, at 20.

[18] Committee on Ways and Means, U.S. House of Representatives, *Overview of Entitlement Programs* [hereinafter: "the Green Book"] (July 15, 1994) p. 1154, Table H-1.

[19] *Id.* at 1160, Table H-5.

[20] The State of Asian Pacific America: Economic Diversity, Issues & Policy, ed. by Paul Ong, "Economic Diversity" by Paul Ong and Suzanne Hee, p. 36 (1994).

[21] *Id*. at p. 1096, Table F-3.

[22] U.S. Department of Health & Human Services, *Report of the Secretary's Task Force on Black & Minority Health* [hereinafter: "Black & Minority Health Vol. II"], Vol. II (August 1985) at 299.

[23] The Health Status of Women of Color by Wilhelmina Leigh, p. 16 (1994).

[24] *Id.* at 300, Table 5.

[25] Health & Medical Care, *supra* note 4, at 22.

[26] Confronting Critical Health Issues of Asian and Pacific Islander Americans, ed. by Nolan Zane, David

Takeuchi, Kathleen Young, "Acquired Immunodeficiency Syndrome" by Terry S. Gock, p. 252 (1994).

[27] *R. Blendon, et al., Medicaid Beneficiaries and Health Reform*, Data Watch p.132-143 at 141. Twenty-eight percent of Medicaid beneficiaries surveyed (two to three million adults) did not have enough money last year to buy food, 31% could not pay their rent or mortgage, and 29% could not pay their heat or light bills. One in four Medicaid beneficiaries will not have enough money to pay this year's forecast medical bills. *Id.*; *see Prenatal Care: Medicaid Recipients and Uninsured Women Obtain Insufficient Care*, U.S. Government Accounting Office (September 1987), GAOHRD-87-137 at 19.

[28] Black & Minority Health Vol. II, *supra* note 20, at 301.

[29] National Association of Community Health Centers, *Lives in the Balance: The Health Status of American's Medically Underserved Populations*, (March 1993) at 6.

[30] Physician Payment Review Commission, *Physician Payment Under Medicaid*, No. 91-4 (1991) p. 61-63.

[31] The Health Systems Agency of New York City, *Primary and Preventive Health Care Report* (April 1990) at 39.

[32] Brellochs, Christel and Carter, *Building Primary Health Care in New York City's Low-Income Communities*, Community Service Society of New York, 1990, p. 61.

[33] This estimate of primary care needs is probably conservative, because is its based on the average number of primary care visits for residents of New York City — 3.9 visits. Low-income people usually are in poorer health and require more doctor visits than the general population. *Id.* at 15.

[34] Only 37.3% of these 107 doctors have admitting privileges at a hospital. Only 34.6% of the doctors practicing in Harlem are board certified. *Id.* at 64, Table 6. City-wide 64.1% of doctors are board certified. Id. at 27.

[35] *Id.* at 26.

[36] *Id.* at 26.

[37] Alan Sager, Ph.D., The Closure of Hospitals That Serve the Poor: Implications for Health Planning, A Statement to the Subcommittee on Health and the Environment, Committee on Energy and Commerce, U.S. House of Representatives, April 30, 1982, p. 2. Schazkin, A. The Relationship of Inpatient Racial Composition and Hospital Closure in New York City, Med. Care (1984); 22:379-387. The Northern West Side of Manhattan, which includes Central and West Harlem, has lost seven hospitals in twenty years. West Side/West Harlem Community Health Planning Coalition, Report & Recommendations on Maternal and Child Health Needs in West Harlem, Morningside Heights, and Manhattan Valley (April 1989) at 5.

Since the turn of the century the number of African American hospitals in this country has dropped from more than 200 to only eight. These include Howard University Hospital, Hubbard Hospital and Drew Medical Center. Steve Fravella, "Black Hospitals, struggling to Survive: Of More than 200 Medical Centers, Only 8 Are Left," The Washington Post, Health: A Weekly Journal of Medicine, Science, and Society, Sept. 11, 1990, p. 12.

[38] Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 Hastings Law Journal 135, 155 n. 69 (September 1978).

[39] *Id.* at 158, 159-60.

[40] *Id.* at 174.

[41] *Investigation of the Office for Civil Rights in the Department of Health and Human Services*, House Committee on Government Operations, 100th Cong., 1st Sess., Rpt. 100-56 (April 15, 1987), GPO 71-589.

[42] In addition, the Omnibus Reconciliation Act of 1981 requires nondiscrimination on the basis or race, color, national origin, handicap, age, sex, and religion in health care block grant programs.

Other civil rights statutes provide important protections for minorities, although they do not expressly create protections on the basis of race and national origin. These include the Rehabilitation Act of 1973, Title V, § 504, 29 U.S.C. §794(a) *et seq.* (prohibiting discrimination against the handicapped in programs receiving federally financial assistance), the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* (extending Rehabilitation Act protections to all programs, activities and services provided by state and local governments, without regard to whether they receive federal financial assistance employment and public accommodations), the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-1 (prohibiting federally funded private and public hospitals and outpatient facilities from discriminating against substance abusers who are suffering from medical conditions in admission or treatment) and sections 704 and 855 of the Public Health Service Act (prohibiting discrimination on the basis of sex in admission to health-related training programs funded by the Act).

[43] 45 C.F.R. §80.3(b)(1)(i)-(v).

[44] 45 C.F.R. § 80.3(b)(3).

[45] 45 C.F.R. §80.7(a).

[46] 45 C.F.R. §80.7(d).

[47] 45 C.F.R. §80.8.

[48] 45 C.F.R. §80.8.

[49] *See Statistical Abstract of the United States* (1992) 98, Table 136, and 315, Table 491.

[50] *See Id.* at 100, Table 142.

[51] *See Id.* at 100, Table 141 and 98, Table 137.

[52] GAO, *Medicaid: Data Improvements Needed to Help Manage Health Care Program*, May 1993, 2, GAO/IMTEC-93-18, [hereinafter, "Data Improvements"].

[53] Committee on Ways and Means, U.S. House of Representatives, *Overview of Entitlement Programs* (The Green Book), July 15, 1994, p. 127, Table 5-3.

[54] *See Cook v. Ochsner Foundation Hospital*, 319 F.Supp. 603, 606 (E.D.La. 1970); *American Hospital Association v. Schweiker*, 721 F.2d 170, 172 (7th Cir. 1983), *cert. denied sub nom, American Hospital Association v. Heckler*, 466 U.S. 958 (1984); S. Rep. No. at 1393.

[55] S. Rep. No. at 1384. Data is collected triennially from Hill-Burton fund recipients, but is only a two week sample of race data from facilitates

[56] S. Rep. No. at 1384.

[57] 42 C.F.R. § 124.603(a)(1).

[58] 42 C.F.R. § 124.603(c)(2). The 1974 regulations indicate that the obligation not to discriminate against Medicaid beneficiaries in the service area prohibits acts that have the "effect" of discrimination, not just intentional discrimination. The regulation required facilities to take "such additional steps as may be necessary to ensure that admission to and services of the facility will be available" to Medicaid beneficiaries. 42 C.F.R. § 53.113 (d)(2)(ii), as added by 39 Fed. Reg. 31,767 (1974).

[59] 42 C.F.R. §§ 124.603(b) and 124.603(d).

[60] The names of facilities subject to the Hill-Burton Act are not published. However, the information is available from the U.S. Department of Health & Human Services' Office for Civil Rights, Management Information and Analysis Division.

[61] Executive Orders 11764 and 12250, 41 *Federal Register* 52669 (December 1, 1976), 45 *Federal Register* 72995 (Nov. 2, 1980).

[62] 28 C.F.R. § 42.406(a).

[63] 45 C.F.R. §80.6(b).

[64] *See* Wing, *Title VI and Health Facilities: Forms Without Substance,* 30 HASTINGS L. REV. 137 (1978).

[65] States submit three key reports: (1) the HCFA-37 or Medicaid Program Budget Report, (2) the HCFA-64 or Quarterly Medicaid Statement of Expenditures for the Medical Assistance Program, and (3) the HCFA-2082 or Statistical Report on Medical Care Eligibles, Recipients, Payments, and Services. Data Improvements, *supra* note 11, at 2. HCFA paid states a total of $441 million in 1992 to operate MMISS. *Id.* at 3.

[66] *Id.* at 3, and 15, Appendix II.

[67] Perkins, *Race Discrimination in American's Health Care System*, Clearinghouse Review, Special Issue 1993, 371, at 378.

[68] *Id.* at 4, 6.

[69] *See Grove City College v. Bell*, 465 U.S. 555, 564-66 (1983) ("[T]he economic effect of direct and indirect assistance often is indistinguishable").

[70] *Madison-Hughes, et al. v. Shalala, et al.*, C.A. No. 3:93-0048 (M.D. Tenn.).

[71] 42 U.S.C. § 300s; 42 U.S.C. § 1315(a).

[72] *Latimore, et al. v. County of Contra Costa*, C.A. No. 94-1257 SBA.

[73] Many believe that the 1990 census under-counted minorities, so that the figures may be higher.

[74] Asian & Pacific Islander Population: United States—Linguistic characteristices, Association of Asian Pacific community Health Organizations (1994).

[75] Testimony on the Disadvantaged Minority Health Improvement Act before the United States Senate Committee on Labor and Human Resources Subcommittee on Health, June 30, 1993, submitted by David Leung, Board Member of South Cove Community Health Center, Jean Lau Chin, Executive Director, South Cove Community Health Center, and Lauren Mayeno, Executive Director, Association of Asian Pacific Community Health Organizations.

[76] Sidney D. Watson, Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy, 58 Fordham Law Review 939 (April 1990).

[77] Confronting Critical Health Issues of Asian and Pacific Islander Americans, ed. by Nolan Zane, David Takeuchi, Kathleen Young, "Access to Health Care" by Lauren Mayeno and Sherry Hirota, pp. 353-54 (1994).

[78] 45 C.F.R. § 80.2 (1992).

[79] *See* 45 C.F.R. § 80 App a. pt. 1, No. 121 (1992).

[80] The Green Book, *supra* note 17, at 175.

[81] The Green Book, *supra* note 17, at 174, Table 5-19.

[82] Social Security Administration, HEW, Claims Manual Ch. X 10,069 (1972).

[83] Social Security Administration, HEW, Health Insurance Handbook (June 1966).

[84] 84 C.F.R. app. A. subpart A(2) (1992).

[85] *See infra* note 65.

[86] 42 U.S.C § 2000d-1.

[87] The Administrator of HCFA has the authority to approve requests, but may not deny a request without first consulting the Secretary. 42 C.F.R. § 430.25(f)(2).

[88] HCFA approved waivers for Rhode Island, Kentucky, Hawaii, Oregon ,and Tennessee. Rosenbaum, S., *An Overview of Section 1115 Medicaid Waivers Approved in 1993*, prepared for the Kaiser Commission on the Future of Medicaid (February 1994).

[89] 42 C.F.R. § 430.25(b).

[90] Other waivers include the § 1915(b) waiver, 42 U.S.C. § 1396n(b), that allows a state to (1) implement a primary care case management system or a specialty physician system, (2) designate a locality to act as central broker in assisting Medicaid recipients to choose among competing health care plans, (3) provide recipients additional benefits with cost savings obtained by the recipient's use of cost effective medical care, and (4) limit recipients' choice of providers (except for emergency services and family planning services). 42 C.F.R. § 430.25(c)(1)(i)-(iv). Any requirement of § 1902 of the Act (42 U.S.C. § 1396a(a)) may be waived to achieve an permissible purpose under the Act. 42 C.F.R. § 430.25(d)(1).

No waiver under this subsection may restrict the choice of the individual in receiving family planning services under section 1396d(a)(4)(C). In addition, the Secretary must monitor the implementation of §1915(b) waivers to assure compliance with the requirements of the waiver and terminate it if, after notice and hearing determines noncompliance. 42 U.S.C. § 1396n(f)(1).

A waiver under § 1916(a)(3) or (b)(3) of the Act allows a state to impose a deduction, cost-sharing or similar charge of up to twice the "nominal charge" established under the plan for outpatient services for non-emergency hospital emergency room treatment, and recipients actually have available non-emergency outpatient services. 42 C.F.R. § 430.25(c)(3). Waivers under § 1916 may only be approved if the state shows, to HCFA's satisfaction, that Medicaid recipients have available and accessible sources of non-emergency care, other than hospital emergency rooms. 42 C.F.R. § 430.25(g)(2).

Financial screening practices, including the requirement of deposits, co-payments or deposits on admission often create substantial barriers for the poor, who have no excess income for such services. African Americans are disproportionately effected by such practices and, therefore, are likely to be disproportionately denied services by such practices.

HCFA must require the state agency to provide data on physician utilization patterns of Medicaid patients by race, as well as emergency room utilization patterns of Medicaid recipients by race, before determining whether to grant the waiver. If the data suggests that African Americans and other racial and ethnic minorities have lower physician utilization patterns and higher emergency utilization patterns, it must require the state to present a plan to decrease barriers to primary care services of the African American population. Moreover, HCFA should require implementation and monitoring of an access plan prior to approval and implementation of the waiver.

[91] A waiver under § 1915(a) allows a state to radically change its health financing and delivery system. It provides, in pertinent part, that

> In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter...XIX of this chapter ... in a State or States —
>
> (1) the Secretary may waive compliance with any of the requirements of ... section 1396a of this title, as the case may be, to the extent and for the period [she] finds necessary to enable such State or States to carry out such project ...

[92] 42 U.S.C. §1396n(b).

[93] § 1916(a)(3) or (b)(3).

[94] 1984 *Standards for Medicaid Demonstrations*.

[95] As a result, on December 30, 1991 LDF, Legal Services of Middle Tennessee, Rural Legal Services of Tennessee, Inc., and the law firm Hogan & Hartson filed a federal class action on behalf of women in Tennessee who are, or will be, in need of, and unable to obtain prenatal care. *Sheila Brewster, et al. v. H. Russell White et al.*, Civil Action No. 91-1066. The action challenges the state's administration of its Medicaid program because many female recipients who are in need of prenatal care must travel long distances to find a doctor, if they are able.

The lawsuit also alleges violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, because the dearth of Medicaid providers disproportionately denies African American women access to prenatal care services.

The lawsuit also alleges violation of § 4112(d) of the Omnibus Budget Reconciliation Act of 1987, 42 U.S.C. § 1396r-4(d), that allows states to provide additional funds to hospitals that have a large patient population that is Medicaid eligible, if the hospital has at least two full time obstetricians on staff who have agreed to provide services to Medicaid. Tennessee commonly provides additional funds to hospitals that do not have at least two full-time obstetricians.

[96] 42 U.S.C. § 1396a(a)(30)(A). The regulations promulgated under the provision mandates that "[t]he agency's payments must be sufficient to enlist enough providers so that services under the plan are available to recipients at least to the extent that those services are available to the general population." 42 C.F.R. § 447.204.

[97] *See* 42 U.S.C. §1396a(a)(13)(E).

Chapter XX

Invisible Women: Uncovering the Health Care Problems Faced by Women of Color

by Jocelyn Frye

I. Introduction

In an article exploring the health care problems facing women of color, author Judy Scales-Trent observes:

> Our poor health is connected to the kind of work we are allowed to do. Our inability to find good work is related to bad education, which is in turn related to segregated housing. Segregated housing, often dangerous housing, in turn affects our health, which, in turn, affects our ability to work. It is all a piece. Pull any one of these strands and our lives unravel. We will not get well until our communities get well.[1]

Scales-Trent's analysis suggests an inextricable link between the health of women of color and a broad range of cultural, societal, and economic factors. Understanding the effects of these interconnected factors may begin to answer largely unexplored questions about the health problems experienced by women of color, and may lead to effective strategies for tackling these health care problems to reduce health risks for women of color.

This article seeks to examine the health problems confronting women of color[2] by identifying specific health conditions that disproportionately affect women of color and important factors that contribute to such disparities, discussing the barriers and discriminatory practices that limit access to quality health care services for women of color, and evaluating the federal efforts undertaken to address the health concerns of women of color.[3] Examining this broad range of issues and their affect on the health of women of color is the first step toward crafting specific policy proposals that respond to these problems. Accordingly, this article concludes with recommendations on specific policy, research, and public education initiatives needed to improve health care services for women of color.

II. Women of Color and the Status of Their Health

A. The Environment: Mounting Pressures Facing Women of Color

The health problems of women of color cannot be fully explored without first examining them in the context of the changing environment in which many women of color live. Recent statistics speak volumes about the increasingly central role that women of color have assumed in the struggle to take care of their families and meet their health care needs. Indeed, a growing number of women of color are single heads of households who are faced with the responsibility for, among other things, obtaining health care services for other family members as well as themselves. For example, in 1991, women of color were more likely to head households than both their male counterparts and white women. Almost one-half of all African American households, approximately 46.4%, were single head households headed by African American women compared to only 6.5% headed by African American men.[4] Similarly, Hispanic women headed 24.4% of all Hispanic households compared to 7.4% headed by Hispanic men.[5] In contrast, white women headed 13.5% of all white households compared to 4.1% headed by white men.[6] The increased responsibility placed on women of color to secure health care services for themselves and their families is made more difficult by the fact that women of color are the least likely to have health insurance. Indeed, 32% of Hispanic women, 20% of African American women, and 18% of other women of color[7] are uninsured.[8]

Further complicating access to quality health care is the fact that many women of color live at the economic margins and experience higher rates of poverty. In 1990, the poverty rate was 29% for African American women and Native American women, and 24% for Hispanic women.[9] While women of color who live below poverty often have access to public health insurance such as Medicaid,[10] there are many restrictions on which services are covered.[11] For example, states have the option of covering dental care services and prescription drugs[12] and, under the Hyde amendment, the cost of an abortion can be covered only in cases of rape or incest or if a woman's life is at stake. Moreover, many health care providers refuse to accept Medicaid reimbursements because, they argue, the payments fall too far short of their actual costs. As a result, many poor women of color, and other poor people, rely heavily on hospital outpatient clinics and emergency rooms as their primary source of care.[13] Women of color who do not qualify for public insurance have even more difficulties obtaining quality health care services. Hospital closures in many communities of color have decreased the number of facilities available to provide health care services. A study of 10 U.S. cities found a 45% decrease in the number of office-based primary care physicians in poor, inner-city neighborhoods between 1963 and 1980.[14]

Because health care problems do not operate in a vacuum, the particular health problems facing women of color often are exacerbated by other factors that, on their face, seem unrelated to health care. Discriminatory employment practices, for example, have resulted in a heavy concentration of women of color in the low wage and contingent workforce with reduced benefits, limited ability to pay for health care services, and limited access to health insurance coverage.[15] Many of these women of color are stuck in jobs that are largely invisible and unregulated, such as domestic services jobs that are filled by many Latinas, where they may be more vulnerable to discriminatory practices.[16] Low wage jobs also may pose increased health risks such as exposure to dangerous chemicals or other safety hazards. For example, one study estimates that black women have a 39% greater chance of sustaining serious job-related injuries or diseases than non-minorities.[17] Other studies have revealed that Hispanics are overrepresented in high-risk industries where injuries are more likely to occur such as construction, garment, and metal mining.[18] Limited educational opportunities in poor communities and inadequate training programs that track women of color into traditionally female, low-wage jobs prevent poor women of color from obtaining better employment opportunities. Other problems such as substandard and overcrowded housing conditions in poor communities also create a higher risk of disease for poor women of color and other poor people.[19]

Simply put, the deteriorating economic outlook for women of color combined with their uneven access to health care seriously impedes their ability to obtain adequate health care for themselves and their families. The health care problems facing women of color, moreover, are linked to a complex range of factors including employment, housing, education, and poverty, which together can limit access to adequate health care services. Absent regular access to quality health care services, many women of color, and their families, experience poorer health and are at greater risk to develop serious health problems.

B. The Statistics: Health Problems Facing Women of Color

The health consequences of the unique burdens borne by many women of color can be assessed best by examining basic measures of the relative health of women in various racial and ethnic groups. Life expectancy and mortality rates are a good starting point because they are often revealing barometers of the standard of living for various groups. Although over the past two years the average life expectancy has risen for all race and sex categories, the average life expectancy for women of color continues to trail the average for white women. Data collected in 1980 and from 1986 to 1988 revealed that the life expectancy for White women was 79.2 years compared to 77.1 years for Hispanic women, 76.2 years for Native American women, and 73.5 years for black women.[20] In 1991, white women could anticipate a life expectancy from birth of 79.6 years compared to 73.8 years for black women and 77.5 years for Native American women.[21] Moreover, in the case of white and black women, the life expectancy rate for white women is rising faster than the rate for black women.[22]

Not only do women of color live shorter lives than white women, women of color are often more likely to die from certain diseases. The age-adjusted mortality rates of white women and black women[23] for the leading causes of death illustrate that black women have a higher risk of death than white women in thirteen of the fifteen categories — heart diseases; malignant neoplasms (cancers); cerebrovascular diseases; accidents and adverse effects; pneumonia and influenza; diabetes mellitus; human immunodeficiency virus infection; homicide and legal intervention; chronic liver disease and cirrhosis; nephritis, nephrotic syndrome, and nephrosis; septicemia; atherosclerosis; and certain conditions originating in the perinatal period.[24] Closer scrutiny of available data reveals similar disparities for all women of color.

For example, in many cases, women of color have higher death rates and lower five-year survival rates for certain cancers when compared to white women. A recent study concluded that the risk of death from breast cancer for black women was 2.2 times greater than the risk for white women.[25] The lowest five-year survival rates for breast cancer were for Native American women (less than 40%) and black women (64%) while the rate exceeded 70% for all other groups.[26] Similarly, the rate of cervical cancer for Mexican American women is almost twice the rate for white women.[27] Even higher rates have been reported for black, Native American, and Chinese American women.[28]

Chronic disabling conditions such as diabetes mellitus are more prevalent in many women of color. When compared to white women, the incidence of diabetes is two times higher for black women, 2.5 times higher for Hispanic women, and five times higher for Native American women.[29] In Hawaii, the incidence rates for Native Hawaiians, Filipinos, Japanese, Koreans, and Chinese Americans are double the rates for whites.[30] Obesity, which contributes to diabetes as well as other conditions, is also a problem for most women of color, particularly Native American, Pacific Islander, and Black women.

Disparities in the incidence of autoimmune diseases have also been uncovered. For example, systemic lupus erythematosus is three times more prevalent in black women that white women, and black women constitute 60% of lupus patients.[31] Other disparities experienced by women of color include higher rates of death from violence, such as homicide.

One of the most troubling statistics is the rapid rise in the incidence of HIV/AIDS in black and Hispanic women. During the period 1981 to 1989, Black and Hispanic women accounted for almost 75% of all new HIV/AIDS cases among women even though they comprised only 21.2% of the population.[32] By 1993, the rate of HIV/AIDS cases for black women was 15 times greater than the rate for white women.[33] As of March 1993, almost 80% of pediatric AIDS cases involved Black or Hispanic children.[34]

The health problems experienced by women of color also impact on the health of their children. In 1991, the infant mortality rate for black infants, 17.6 infant deaths (under 1 year old) per 1,000 live births, was 2.4 times greater than the rate of 7.3 deaths for white infants.[35] Similarly, the infant mortality rates for Mexican American (7.5) and Puerto Rican (9.0) also exceeded the rates for white infants.[36] Between 1989 and 1991, the infant mortality rate for Indian and Alaska Native women (10.2) was significantly higher than the rate for white infants.[37] Many of these infant deaths can be traced back to low birth weight, an important predictor of infant survival.[38] In 1991, 32% of low birth weight infants (defined as infants weighing less than 5 pounds 8 ounces) and 38% of very low birth weight infants were black, even though black infants comprised only 17% of all births.[39] Similarly, Puerto Rican mothers are more likely to have low birth weight infants than white women.[40]

These few examples of health problems confronting many women of color[41] illustrate the need for extensive study to understand the complex range of causal factors that lead to health disparities between women of color and white women. Recent studies on breast cancer, for example, have sought explanations for lower breast cancer survival rates for black women by trying to parse out the different causal factors and assess their relative importance. These studies have uncovered some causes, such as poor access to cancer screening tests and health care treatment between black and white women, but the other causes remain a mystery.[42] But, grappling with the variety of factors leading to the lower survival rates is a critical first step toward developing better treatment. Thus, expanding the analytical parameters to recognize the range of differences between women of color and white women can lead to a better understanding of the unique health care needs of women of color.[43]

C. The Intersection of Race and Gender: Barriers Affecting the Access to Quality Health Care for Women of Color

Women of color, whose unique status as both women and people of color exposes them to the combined effects of race and gender bias, are targets of discrimination more often than either white women or men of color.[44] A thorough examination of the health care problems of women of color, thus, demands an analysis of how the intersection of race and gender can make women of color more vulnerable and create obstacles for women of color seeking adequate health care services.[45] By using the race and gender paradigm to analyze the health of women of color, specific problems can be identified and strategies can be developed for improving their health.

1. Lack of Respect for the Right and Ability of Women of Color to Make Choices About Their Health

The issue of respect for women of color and their health choices is an important analytical starting point because biased attitudes about the right and ability of women of color to make choices about their health underlie many of their health care problems. In the context of women's health generally, the issue of personal choice has arisen most visibly around the abortion debate where advocates have argued that the recognition of a woman's right to make choices about her health is critical to fundamental notions of privacy and equality. Whether the issue is abortion or another aspect of health care, it seems clear that individuals should be able to make choices about their health care needs. Women of color, however, seem particularly vulnerable to serious erosions of their autonomy to make decisions about their health. Analyzing the combined effects of race and gender on the ability of women of color to make their own health choices illustrates that women of color often are disproportionately the victims of efforts to control health care behavior and limit health care autonomy.

Exploring issues of respect for women of color and their health choices through the prism of reproductive health,[46] for example, reveals several examples of policies and/or proposals that would disproportionately impact the procreative choices of women of color. One example involves recent legislative proposals on the birth control implant Norplant.[47] Touted as a virtually foolproof, long-lasting, easy form of contraception, Norplant has been eagerly sought after by women seeking effective contraception that requires little attention after it has been implanted.[48] Norplant has been viewed as a breakthrough contraceptive, particularly for teenagers, because it prevents pregnancy for five years and does not require daily pill taking.[49]

Although pleased with the promise of Norplant, many experts have cautioned that there are possible side effects to the implant, such as irregular menstrual cycles, weight gain, heart attacks, and strokes, and women should be fully informed about these side effects before consenting to the insertion.

Further, Norplant is contraindicated for women with certain medical conditions such as breast cancer and liver disease.[50]

In addition to these medical problems, the use of Norplant has generated other concerns about the thoroughness of Norplant counseling, tendencies to relax monitoring of other health concerns, Norplant's potential for coercive use, and lack of reproductive autonomy. Questions about the quality of counseling have emerged because some women were not informed about the difficulties with removing the implant[51] and others who have sought removal have been urged to keep the implant a little longer.[52] Another concern is that women who use Norplant, particularly teenagers, will become lax in using condoms to protect themselves against sexually transmitted diseases.[53] Still others question the soundness of policies urged by legislators who promote Norplant as a method for solving social problems such as teenage pregnancy.[54]

Indeed, many policymakers, impressed by Norplant's documented effectiveness and long-lasting impact, view Norplant as a panacea for teenage pregnancy, multiple pregnancies by women on welfare, drug abuse by pregnant women, and child abuse. Since December 1990, 49 bills in 23 states have been proposed regarding Norplant's availability.[55] The bills are varied in their approach, including such provisions as proposing financial incentives to poor women to use Norplant, conditioning receipt of welfare benefits on the use of Norplant, requiring certain women (such as those convicted of drug offenses or who give birth to drug-exposed infants) to use Norplant, and prohibiting increases in AFDC payments to recipients who fail to use Norplant.[56]

Some of these proposed legislative measures may improve the ability for some poor women to obtain Norplant. But, the desire to find an easy solution to social problems such as drug dependence or teenage pregnancy may lead some legislators to disregard Norplant's side effects or other problems.[57] Measures proposing to condition welfare payments on the recipient's use of Norplant may work coercively, forcing women to choose between their economic security and their own health. Many of the women forced to make this choice will be poor women of color.

The willingness to target these women may be rooted in racist and sexist misperceptions about women of color, their right to reproductive autonomy, their ability to make informed choices, their sexuality, and welfare dependence.[58] If such misperceptions guide legislative choices, Norplant can become a tool of control to disproportionately regulate certain behavior of poor women of color.[59] The use of Norplant as well as any future legislative measures, therefore, must be closely "scrutinized to ensure that this potential source of reproductive liberty does not become an instrument of oppression."[60]

The potential problems with Norplant legislation are but one example of how the ability of women of color to make personal choices can be compromised in the health care context. Another example that demands close scrutiny involves drug dependent women who become pregnant. Drug dependent pregnant women have become targets of various punitive measures, including threats of criminal prosecution and involuntary commitment, unless they consent to participate in drug treatment programs.[61] Many drug treatment programs, however, do not accept pregnant women. Moreover, women of color have been the targets in a disproportionate number of cases primarily because the pregnant women are identified through public hospitals where low income women of color are more likely to be treated.

Analyzing the effect of race and gender bias[62] on issues of respect and autonomy illustrates how the right and ability of women of color to make their own health choices can be seriously compromised. Understanding the role of race and gender, thus, becomes a critical component of any assessment of women of color and their health.

2. Lack of Access to Health Care Services, Facilities, and Providers

Good health depends, in part, on accessible, quality health care services, including access to regular preventive care, access to health facilities that can provide necessary medical treatment, and access to health care providers/practitioners who understand the needs of their patients. An evaluation of the accessibility of health care services for women illustrates that women of color often experience more problems than white women in obtaining necessary health care services and grappling with discriminatory barriers to care.

As mentioned earlier in this article, many women of color live in predominantly minority communities that slowly have been abandoned by health care facilities, thus, eroding the availability of health care services.[63] Many of these facilities move to the suburbs where the clientele is typically more affluent, more white, and more healthy. Even those facilities that stay in predominantly minority communities may choose to eliminate certain health care services, like obstetrical services, or transfer them to facilities in other communities to avoid serving minority or low-income patients.[64] Not surprisingly, the predominantly minority communities, many of which are poorer communities with already uneven access to health care, become sicker and more costly to serve.

Because of the scarcity of health care services, many women of color simply go without regular preventive care and rely on emergency services for their medical needs. The effect on women of color shows up most vividly in statistics that trace their higher health risks, in part, to a lack of adequate preventive care services. For example, a study of the 1986 national statistics on U.S. hospitalizations revealed that black women, who represented 15.5% of single liveborns in that year, were disproportionately hospitalized for conditions reflecting inadequate prenatal care such as fetal distress (20.2%), threatened premature labor (22.1%), and spontaneous abortion (20.1%).[65] Other statistics show that Native American, black, and Hispanic (specifically Mexican American, Puerto Rican, and Central and South American) women are the least likely to have early prenatal care, which places their pregnancies at a higher risk.[66] In addition, recent studies have traced the low survival rates for black women with breast cancer, in part, to the lack of early preventive care.[67]

Many women of color, particularly those who speak little or no English, also face cultural barriers to health care services. For example, HIV/AIDS prevention programs may be less effective in some communities because of a hesitance in some cultures, for women in particular, to discuss sexual practices openly.[68] Different strategies may be needed to break through these cultural barriers and provide women with important medical informaton. In some communities of color, family decisionmaking often plays a more significant role in health care decisions: many Asian and Pacific Islander and Hispanic cultures stress family decisionmaking even before seeking professional health care advice.[69] Linguistic barriers often hinder medical treatment because many health providers and practitioners do not have adequate translation capabilities and some medical terminology is not easily translated from one language to another. Further, many health care providers and practitioners are neither aware nor respectful of healing practices like using indigenous healers, acupunture, herbal medicines, and folk medicines.[70]

For many women of color, the additional barriers imposed by the health care delivery infrastructure — hospitals and other facilities, providers, and practitioners — threaten their overall health and risk exacerbating the already existing health disparities between white women and women of color. All of these barriers must be considered to develop effective strategies for providing women of color with much-needed health care services and treatment.

3. Lack of Research and Data

Until recently, little health research focused on the unique health concerns of women of color.[71] In response to prodding from legislators and the public, the National Institutes of Health and other federal research agencies have turned their attention to strengthening women's health research. But, it is unclear how much of this research encompasses women of color. More extensive research on diseases in women from various racial and ethnic subpopulations may answer questions about the causes of disparities between women of color and white women, and lead to improved treatment for women of color.

To the extent that health data is currently collected, it is often not consistently collected with sufficient specificity about women in various racial and ethnic subpopulations. The methods used for some data collection may result in understating numbers for certain populations. For example, mortality statistics are based, in part, on data received from funeral directors who may simply rely on a visual determination of a decedent's race. As a result, some individuals may be misidentified by race or ethnicity. Some studies show that miscounting and miscoding problems have led to underestimated infant mortality rates in many racial and ethnic subpopulations, particularly for Filipino, Japanese, American Indian, and Chinese communities.[72] Of particular concern is the lack of health data on Asian American and Pacific Islander women. One frequent problem is that the data collection methodology fails to include a sufficiently large sample size to collect accurate data. Further, data on Native American women may be understated because of problems with misidentification and underinclusive counting procedures. The Indian Health Service, for example, relies on data collected from Indian health service areas, but does not necessarily have accurate and complete data on Native Americans who reside elsewhere.

In the past, women of color have been largely invisible in health research and data collection efforts. That invisibility has led to barriers for women of color seeking health care services that are responsive to their needs. Improved data collection and research is one piece of a larger strategy needed to strengthen our understanding of the scope of the health care problems facing women of color and to provide them with better health care.

III. Government Efforts to Address Health Concerns of Women of Color

A. The Administration Record

The multidimensional health care problems facing women of color demand a diverse array of creative solutions rather than singular or "quick-fix" responses. Thus, the Clinton Administration's record in addressing the health concerns of women of color must be evaluated by assessing different aspects of the Administration's research, public education/outreach, enforcement, and legislative efforts.

1. Administrative Structure

A number of the federal agencies that focus on health issues, including the National Institutes of Health (NIH), Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), Food and Drug Administration, and Substance Abuse and Mental Health Services Administration, have established, or are in the process of establishing, offices on women's health. These offices have different missions and play different roles within each agency. At NIH, for example, the Office of Research on Women's Health (ORWH) is part of the NIH Director's Office and is responsible for monitoring NIH's inclusion of women and minorities in research and clinical trials. The HHS Office on Women's Health, whose head was elevated by President Clinton to Deputy Assistant Secretary for Health, operates out of the HHS Office of the Assistant Secretary for Health and seeks to coordinate women's health issues across the various federal agencies. Some of these agencies, such as NIH and HHS, also have established offices to focus on minority health issues.

The emergence of these various women's health and minority health offices throughout the federal health agencies should work to ensure that the health concerns of women and racial/ethnic groups are not forgotten when health programs and policies are developed. Less defined, however, are the mechanisms in place within these offices to ensure that the health problems facing women of color also become visible. Structural improvements — such as refining the office mission to make clear how women of color and their health concerns will be addressed, developing a comprehensive women of color health agenda, and/or employing individuals with expertise on women of color and their health within the office — may be necessary to ensure that the health concerns of women of color receive adequate attention and are considered as policies are developed. Moreover, representatives from these various women's and minority health offices should meet regularly to coordinate their efforts and ensure that the health concerns of women of color, and indeed women and people of color generally, are addressed in a comprehensive manner. Such coordination would avoid overlap and increase the overall effectiveness of the Administration's efforts.

2. Research on Health Problems Facing Women of Color

Some of these newly created offices, as well as other federal research entities like the Agency for Health Care Policy Research, have begun new research on women of color by sponsoring discrete projects to study specific health problems facing women of color. For example, ORWH is funding research to examine behaviors of Hispanic/Latina women that may increase their risk of contracting sexually transmitted diseases, particularly the diseases associated with cervical cancer.[73] None of these offices, however, have developed a comprehensive research agenda specifically focused on women of color, and the absence of such an agenda risks marginalizing their health concerns.

As the primary federal health research body, NIH/ORWH has taken some important steps to increase the level of women's health research. ORWH was established in 1990, partially in response to concerns raised by the Congressional Caucus for Women's Issues, to strengthen NIH's women's health research efforts, to ensure that women are represented in NIH's biomedical and behavioral research, and to increase support for the recruitment, retention, and advancement of women in biomedical careers.[74] In September 1992, ORWH produced a women's health research agenda making specific research recommendations, and became responsible for implementing and monitoring that research agenda. This research agenda includes a significant amount of data documenting the disparities in the incidence of some diseases between white women and women of color. Accordingly, ORWH provides supplemental funds to expand ongoing research to include women, sometimes specifically targeting certain women of color. Further, ORWH has been developing a database to track NIH's women's health research and to monitor NIH's compliance with the NIH Revitalization Act of 1993 which requires, as of FY 1995, the inclusion of women and minorities as subjects in research and clinical trials.[75]

While ORWH has taken important steps toward increasing the overall level of women's health research, NIH and ORWH should consider additional measures to ensure that the health concerns of women of color are adequately researched. For example, ORWH should evaluate the need for a comprehensive health research agenda focused specifically on women of color.[76] The disparities in the incidence of some diseases that currently exist between white women and women of color may suggest different research priorities for white women and some women of color. A specific women of color health research strategy could help to identify research priorities, particularly priorities that may differ from those already set forth in the women's research agenda.

ORWH also may need to develop a process for refining their research agenda. ORWH does not conduct its own research, but rather funds research that is conducted or funded by the NIH Institutes. It is unclear how these research results are evaluated and whether they are used to make more informed decisions about future research direction. The results of NIH's current research, however, could provide useful guidance in identifying new areas of research. Accordingly, NIH/ORWH should investigate how to institute a more formal process for refining the research agenda, and coordinate its work with other federal research efforts.[77]

3. Data Collection Efforts

In the past, the collection of health data on racial and ethnic subpopulations has been uneven. Moreover, the different federal agencies that collect and maintain health statistics have been criticized for their failure to coordinate their data collection efforts.[78] There have been specific attempts to collect and analyze data on racial and ethnic groups through surveys/reports such as the National Health Interview Survey, Hispanic Health and Nutrition Examination Survey, and Healthy People 2000, but these efforts have not been pursued consistently. Although there are current efforts to improve data collection and analysis, HHS should work toward achieving cross-agency consistency and ensuring that all health data collection is sufficiently inclusive. In particular, HHS should give special attention to the collection of data on Asian American and Pacific Islander populations who are consistently underrepresented in most health data collection efforts.

4. Enforcement: Combating Discrimination Faced by Women of Color in the Health Care System

Under prior administrations, HHS's Office of Civil Rights (OCR) has been criticized for its failure to aggressively enforce Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) and challenge discrimination in the health care system.[79] Moreover, using Title VI to challenge discrimination in the health care system that affects women of color is complicated by the fact that Title VI does not prohibit sex discrimination. Nevertheless, through OCR's recent efforts, the Clinton Administration has taken the positive step of pursuing several cases challenging discriminatory health care practices that disproportionately affected women of color.

a. Mount Sinai Hospital

In March 1994, OCR reached an agreement with Mount Sinai Hospital in New York City to resolve allegations that Mount Sinai's maternity ward segregated maternity ward patients by race and payment method.[80] Mount Sinai's practices allegedly resulted in one maternity ward floor consisting of mostly white, middle- or upper-income patients with private insurance and another floor housing Medicaid patients who were predominantly African American and Latina.

Following an investigation by the New York State Department of Health, OCR began an investigation to evaluate Mount Sinai's compliance with Title VI of the Civil Rights Act of 1964[81] and Title VI of the Public Service Health Act (42 U.S.C. 291, *et seq.* also known as Hill-Burton).[82] An OCR analysis of a one year patient census revealed a "statistically significant disparity" between the number of Medicaid patients and the number private insurance patients assigned to certain floors, and between the number of white patients and minority patients assigned to certain floors.[83] OCR concluded that there was a probable violation of Hill-Burton and Title VI, explaining that an inference could be drawn that the patient room assignments were not random and there were no legitimate program objectives that could not be accomplished by less discriminatory means.[84] Mount Sinai voluntarily changed its maternity ward admissions policies before being informed of OCR's investigation. Under the Resolution Agreement, Mount Sinai agreed to permanently adopt a nondiscriminatory maternity admissions policy, disseminate a nondiscrimination policy to all employees and doctors with hospital privileges, include nondiscrimination notices in any information pamphlets for maternity patients, and keep records of any discrimination complaints filed by maternity patients regarding room assignments.[85]

b. The Medical Center of the Medical University of South Carolina

In September 1994, OCR reached a settlement with the Medical Center of the Medical University of South Carolina ("Medical Center") to address the Medical Center's controversial policy (referenced herein as the "Interagency Policy") of referring drug dependent pregnant women to law enforcement officials for prosecution.[86] Begun in 1989, the Interagency Policy directed Medical Center staff to identify suspected drug users from patients seeking prenatal and obstetrical care services. The patient "suspects" were tested secretly for drug use and, if testing positive, were threatened with criminal prosecution unless they agreed to participate in a drug treatment program, submit to continuing drug tests, and follow the Medical Center's prenatal care program.[87] Virtually all of the pregnant women tested were poor, and many of them were black. For these women, their choices were limited because the Medical Center was the only local hospital that would accept indigent, addicted, pregnant women.[88] Pregnant women with access to private prenatal care could avoid using the Medical Center and thus avoid scrutiny. Over the course of five years, several hundred women were tested and approximately 50, mostly black, women were arrested and jailed.[89]

The Medical Center's policy was criticized for unfairly targeting poor black women and divulging private medical information to the police. Moreover, others questioned the Interagency Policy's requirement that women obtain drug treatment when, in fact, the required programs were not available or inadequate.[90] An OCR fact-finding review concluded that implementation of the Interagency Policy had resulted in a possible violation of Title VI of the Civil Rights Act of 1964.[91] The Settlement Agreement directs the Medical Center to cease its referrals of pregnant women to law enforcement officials.[92]

c. Other Enforcement Efforts

In both the Mount Sinai and the Medical Center cases, OCR should be commended for successfully targeted discriminatory practices that disproportionately affected women of color. Effective enforcement will require continued vigilance to seek out other cases involving discriminatory abuses. In addition to the issues discussed, another issue that may require careful monitoring by OCR is the potentially coercive imposition of Norplant on mostly poor women of color. Further, OCR also may want to evaluate the extent to which the inherent limitations of Title VI, which does not include sex as a protected category, hinders its ability to challenge discriminatory practices that disproportionately affect women of color.[93]

5. Legislative Efforts

The Administration's major legislative effort was limited primarily to the comprehensive health care reform effort. Although ultimately unsuccessful, many of the Administration's underlying goals, such as universal coverage/access, the employer mandate, and antidiscrimination protections, would have improved access to health care services for women of color. The Administration also attempted to remove the Hyde Amendment restrictions on the appropriations covering abortion services. The restrictions remained, but were modified to allow for payment of abortions in certain situations.

B. Congressional Efforts

Over the past three years, Congress has increased its focus on women's health issues. In 1991, the Women's Health Equity Act (WHEA), a package of 22 bills designed to expand and improve women's health research and programs, was introduced in Congress. Since that time, several pieces of WHEA have been enacted. During the 103rd Congress, as part of the NIH Revitalization Act of 1993 (1993 Act),[94] Congress authorized an additional $225 million for basic research and $100 million for clinical research on breast cancer, $75 million for expanded basic and clinical research on ovarian cancer, and $40 million for osteoporosis and related bone disorder research.[95] Further, the 1993 Act included provisions authorizing the development and operation of three contraceptive and two infertility research centers, requiring research by the National Institute on Aging on the aging process in women, and requiring the inclusion of women and minorities in clinical research studies.[96]

Congress also reauthorized $100 million for the CDC Breast and Cervical Cancer Mortality Prevention Act, a program that provides mammograms and pap smears to low-income women, representing a $22 million over FY 1994.[97] Sexually transmitted disease prevention programs, including programs to prevent infertility, received $105.4 million. Further, the appropriations for FY 1995 included more than $500 million for breast cancer research.[98] The Department of Defense FY 1994 appropriation authorized primary and preventive health care services for women at military hospitals and clinics. In the second session, funding for the Defense Women's Health Research Program was doubled to $40 million.[99] In addition to these appropriations, modifications to the Hyde Amendment, which restrict Medicaid funding of abortions, were approved to allow for payment of abortions in cases of rape, incest, or life endangerment.[100]

All of these measures demonstrate an increased awareness of and commitment to women's health research and programs. But, while general women's health concerns have received more focus, there has been little or no attention to the unique health problems faced by women of color. Exceptions have been the Congressional hearings, sponsored by Congressman Towns, examining the high incidence of breast cancer in African American women. And the proposed Minority Health Improvement Act of 1994 (S.1569) would have, among other things, strengthened data collection efforts and improved access to health care for disadvantaged individuals, but the conference report failed to get final approval in the Senate. Beyond these initiatives, however, few efforts have been undertaken to thoroughly explore women of color and their health.

IV. Conclusions and Recommendations

The health problems facing women of color are varied and complex, and demand a wide range of strategies for effective treatment. This article attempts to invigorate the ongoing dialogue about women's health to encourage specific policies and proposals designed to improve health care services and treatment for women of color. The effectiveness of these policies will depend, in large part, on how well they recognize that the health needs of women of color cannot be seen in a vacuum, but rather must be defined "broadly to include a healthy workplace, health education, access to good health care, and whatever it takes to give birth to a healthy child."[101] Accordingly, the following recommendations suggest specific steps for a comprehensive health care strategy for women of color:

Research

1. HHS and NIH should develop a comprehensive approach to women of color health issues by strengthening coordination of Administration's health research and other health programs and improving communication between agencies to avoid overlap or gaps in reearch.
2. NIH and other federal research agencies should develop a research agenda for women of color, including targeted research to study disparities between women of color and white women in the incidence of various diseases, and establish an institutional mechanism for refining this research agenda on a regular basis to reflect new data and information.
3. HHS and other federal agencies should improve data collection on the health of women of color with particular attention to racial and ethnic subpopulations to understand intragroup differences.

Access

4. HHS and the Administration should work to strengthen access to health care services for women of color to encourage preventive care by locating health programs and education efforts in communities of color and improving outreach efforts to women of color.
5. HHS should offer training for providers about providing culturally sensitive health care services, such as language interpreters, and educate practitioners about racial and ethnic stereotypes and different cultural norms.
6. The Administration should develop intitiatives designed to increase insurance coverage for low wage workers, especially part-time and contingent workers.

Enforcement

7. HHS/OCR should strengthen enforcement of the relevant antidiscrimination laws to eliminate discriminatory health care practices.

Education

8. Through various federal agencies, the Administration should undertake public education initiatives to increase public awareness of the health problems facing women of color.

Legislative

9. The Administration should work with Congress to develop legislation prohibiting sex discrimination in federally-funded programs.

Endnotes

[1] Judy Scales-Trent, *Women of Color and Health: Issues of Gender, Community, and Power*, 43 STAN. L. REV. 1357, 1361 (1991).

[2] The term "women of color" is used in this article to refer collectively to women from various racial and ethnic backgrounds including African American women, Latinas, Asian American and Pacific Islander women, and Native American women. (For ease of reference, this term is also intended to cover white women of Hispanic origin.) Where available, specific data on the women in these racial or ethnic groups is referenced herein. As will be discussed later, however, the lack of data on women of color (broken down by race and ethnicity) complicates efforts to be comprehensive in identifying the health problems facing all women of color, and reflects the traditional lack of attention given to the health concerns of women of color. In some instances, materials referenced in this article use the term black women instead of African American women and the term Hispanic women instead of Latinas. Unless otherwise noted, these terms will be used interchangeably.

[3] The focus on women of color is not an effort to minimize the very real health care problems faced by white women or men of color. Indeed, until recently, the health care concerns of white women and the role of gender in research on and treatment of various diseases received minimal attention. *See* Abigal Trafford, *Gender Bias in Health Care is No Myth; Discrimination Against Women Occurs in Research and Treatment,* WASHINGTON POST, July 30, 1991, at Z4. Moreover, much work remains to ensure that the health care problems facing white women are adequately addressed. Thorough research on the health problems facing men of color is also needed to understand and respond to their particular health needs. This article focuses specifically on women of color because the unique concerns of women of color often seem invisible, becoming lost in broader discussions about women's health, minority health, or the health care system.

[4] *See* Women's Research and Education Institute, THE AMERICAN WOMAN 1994-1995 WHERE WE STAND (Cynthia Costello and Anne J. Stone eds., 1994), *citing*, Bureau of the Census, *Money, Income of Households, Families and Persons in the United States: 1990, 1991*. The remaining 41.1% of African American families were headed by married couples.

[5] *Id*. The remaining 68.2% of Hispanic families were headed by married couples. Data analyzed by the Population Reference Bureau suggests that Native American women also head more households than Native American men. In 1990, Native American women headed at least 20% of all Native American households compared to 6% headed by Native American men (48% of Native American households were headed by married couples and the remaining 26% of Native American families were single person or non-family households). Population Reference Bureau, *What the 1990 Census Tells Us About Women: A State Factbook* (1993), The same data showed that the rates for Asian American households were closer to rates of white households — approximately 9% of Asian American households were headed by Asian American women compared to 5% headed by Asian American men. *Id.*

[6] THE AMERICAN WOMAN, *supra* note 4.

[7] This percentage represents women from other racial or ethnic groups who are neither Hispanic nor African American.

[8] INSTITUTE FOR WOMEN'S POLICY RESEARCH, WOMEN'S ACCESS TO HEALTH INSURANCE (1994). *See generally* Ruth E. Zambrana, *A Research Agenda on Issues Affecting Poor and Minority Women: A Model for Understanding Their Health Needs,* 12 WOMEN & HEALTH 137, 149 (1988) (reporting that blacks and Puerto Ricans are twice as likely and Mexican Americans are more than three times as likely to be uninsured as whites).

[9] POPULATION REFERENCE BUREAU, *supra* n. 5. No data was included on Asian American and Pacific Islander women.

[10] Approximately 25% of African American women, 17% of Hispanic women, and 15% of women from other races use public health insurance. Institute for Women's Policy Research, *supra* n. 8, at 13-14.

[11] Wilhelmina A. Leigh, Women's Research and Education Institute, The Health Status of Women of Color (1994).

[12] General Accounting Office, Report to the Chairman, Committee on Finance, Medicaid Expansions Coverage Improves but State Fiscal Problems Jeopardize Continued Progress (June 1991).

[13] Wilhemina A. Leigh, *supra* n. 11, at 30.

[14] Sidney D. Watson, *Health Care in the Inner City: Asking the Right Question*, 71 N.C.L.REV. 1647, 1649 (1993). *See, e.g.*, *NAACP, et al. v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981).

[15] According to the National Committee on Pay Equity, two-thirds of low-wage workers are women and women of color are far more likely to be low-wage workers. National Committee on Pay Equity, Factsheet.

[16] Judy Scales-Trent, *supra* n. 1, at 1367.

[17] Ruth E. Zambrana, *supra* n. 8, at 151.

[18] *Id.*

[19] Sidney D. Watson, *supra* n. 14, at 1653.

[20] Wilhemina A. Leigh, *supra* n. 11, at 18. Data for Asian American and Pacific Islander women was unavailable.

[21] Overall, both white and black women have longer life expectancy than their male counterparts. *See* National Center for Health Statistics, Centers for Disease Control and Prevention, Monthly Vital Statistics Report, Vol 42, no. 2 (supp. Aug. 31, 1993). Recent life expectancy data was unavailable for Hispanic, Native American, Asian American, and Pacific Islander women.

[22] Monthly Vital Statistics Report, *supra* n. 21, at 5.

[23] The 1991 Final Data only includes age-adjusted data on the 10 leading causes of death for white women and black women.

[24] For earlier data, *see* The American Woman, *supra* note 4.

[25] J. William Eley, *et al.*, *Racial Differences in Survival From Breast Cancer*, JAMA (Sept. 28, 1994).

[26] Wilhemina A. Leigh, *supra* n. 11, at 24.

[27] Hispanic Women's Health Fact Sheet, National Coalition of Hispanic Health and Human Services Organizations.

[28] Wilhemina A. Leigh, *supra* n. 11, at 24.

[29] *Id.*

[30] *Id.*

[31] Dept. of Health and Hum. Serv., U.S. Public Health Service, Off. on Women's Health, Factsheet, Women's Health Issues (September 1994).

[32] Wilhemina A. Leigh, *supra* n. 11, at 26.

[33] Centers for Disease Control and Prevention, U.S. Public Health Service before the Committee on Government Operations Subcommittee on Human Resources and Intergovernmental Relations (testimony of Dr. Helene D. Gayle, September 16, 1994).

[34] National Council of La Raza, Center for Health Promotion, Hispanic Children and AIDS, June 1993.

[35] Monthly Vital Statistics Report, *supra* n. 21, at 10.

[36] *Id.* at 54. Infant mortality rates for Cubans (5.9) and other Hispanics including those from Central and South America (6.8), however, were lower than the rates for white children. *Id.* This illustrates the need for further study of intragroup differences.

[37] Dep't. of Health and Human Services, Public Health Service, Indian Health Service, Trends in Indian Health - 1994 (July 1994).

[38] *See generally* Jacobs Institute of Women's Health, The Women's Health Data Book (1992).

[39] National Center for Health Statistics, Centers for Disease Control and Prevention, Monthly Vital Statistics Report, vol. 42, no. 3 (supp. September 9, 1993). More recent 1992 statistics reveal little change in the incidence of low birth weight infants with Black infants showing a slight decrease. National Center for Health Statistics, Centers for Disease Control and Prevention, Monthly Vital Statistics Report, vol. 43, no. 5 (supp. October 25, 1994).

[40] *Id.* The incidence of low birth weight infants for other Hispanic women and Asian American and Pacific Islander women, however, is closer to the incidence for white women.

[41] For a more extensive examination of the health status of women of color, *see* Wilhemina A. Leigh, *supra* n. 11.

[42] J. William Eley, *supra* n. 25.

[43] *See* Ruth E. Zambrana, *supra* n. 8, at 150-151 (stressing the importance of taking into account clearly defined socioeconomic, racial, cultural, and regional variables that relate to health care resources, and psychosocial variables that relate to health status and functioning to extract meaningful interpretations of data on different racial and ethnic groups).

[44] *See* Judy Scales-Trent, *supra* n. 1, at 1365 (using example of a Latina's problems with obtaining good prenatal care to illustrate a "women of color issue" — the confluence of two problems related to race and gender, difficulties because she is a woman and difficulties because she is part of the Latino community). Examination of the intersection of race and gender is not limited to the health care context. *See, e.g.,* Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990,* 79 Cal. L. Rev. 775, 797 (1991) (noting in the context of employment that women of color are particularly vulnerable as targets of sexual harassment simply because of their status as women of color).

[45] This article focuses on the external barriers confronting women of color that impact on their ability to obtain health care services and does not undertake a medical analysis of the role that race and gender may play in the higher rates of certain diseases. The medical significance of race and gender, a complex question whose answers are not clearly understood, demands a careful, more comprehensive analysis than is possible in this short article. As several authors have noted, however, the use of variables such as race in clinical research and the conclusions drawn from that research in the past have been imprecise and influenced by racism. *See* Vanessa Northington Gamble and Bonnie Ellen Blustein, *Racial Differentials in Medical Care: Implications for Research on Women*, in Women and Health Research: Ethical and Legal Issus of Including Women in Clinical Studies 74, 180-188 (Anna C. Mastroianni *et al.* eds, vol. 2, 1994) (discussing extensive historical use of medical thought to support the political ideology that black people are inferior such as the use of medical theory to justify the enslavement of Africans); Patricia A. King, *The Dangers of Difference*, Hastings Center Report 22, no. 6 (1992): 35 (arguing that a racist society that incorporates beliefs about the inherent inferiority of African Americans may approach questions about the role of difference in a way that further burdens African Americans); *see also* Janet L. Mitchell, *Recruitment and Retention of Women of Color in Clinical Studies,* in Women and Health Research: Ethical and Legal Issus of Including Women in Clinical Studies 52 (Anna C. Mastroianni *et al.* eds, vol. 2, 1994) (exploring the attitudinal differences that have led to the underrepresentation of women of color in clinical studies).

[46] The central role that reproductive health plays for women generally coupled with the legacy of efforts to control the reproductive capacity of some women of color suggests that reproductive health is a useful analytical framework for discussion. *See generally,* Dorothy Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color,* 14 Women's Rts. L. Rep. 305, 305-307 (1992) (explaining the relationship between reproductive freedom and equality by using the historical example of slavery and the inherent inequality fostered by slaveowners' control over the reproductive capacity of black female slaves).

[47] Norplant, approved in December 1990 by the Food and Drug Administration, consists of six

matchstick-sized capsules inserted under the skin of a woman's upper forearm that offer protection against pregnancy for five years through the slow release of a contraceptive synthetic hormone, levonorgestrel. Wyeth Laboratories, Inc., Norplant System Patient Labeling (information pamphlet) (1994) [hereinafter referenced as Wyeth Pamplet]; Lynn Smith and Nina J. Easton, *The Dilemma of Desire*, L.A.Times, September 26, 1993, (magazine) at 24. The total cost of the implant can exceed $700 — Norplant kits are sold to private and public health care providers for $365 and additional costs are charged by providers for counseling, insertion, and in some cases, removal. *See* The Alan Guttmacher Institute, Norplant: Opportunities and Perils for Low-Income Women, June 1994. All 50 states and the District of Columbia cover the cost of providing Norplant to eligible low income women through Medicaid. *Id.* at 2.

[48] Smith and Easton, *supra* n. 47, at 26.

[49] Philip J. Hilts, *Implant Easily Surpasses Pill in Averting Teen-Age Pregnancy,* The New York Times, Nov. 3, 1994, at B14.

[50] *See* Wyeth Pamphlet, *supra* n. 47, at 1-2.

[51] In September 1993, a lawsuit was filed by a class of former Norplant users who allege injuries suffered as a result of the removal of the implant. The Alan Guttmacher Institute, *supra* n. 47, at 5; *see* Shirley Leung, *Norplant Removal Spur Suits*, Baltimore Sun, July 25, 1994, at 1B. Although almost one million Norplant kits have been purchased since February 1991, it is unclear how many of the implants have been removed. The number of women currently using Norplant is unknown. The Alan Guttmacher Institute, *supra* n. 47, at 2.

[52] Smith and Easton, *supra* n. 47, at 26.

[53] A recent study, however, of 98 adolescent, inner-city mothers who delivered babies at the University of Pennsylvania concluded that Norplant did not lead to a significant decrease in condom use and proved far more effective in preventing pregnancy than birth control pills. Philip J. Hilts, *Implant Easily Surpasses Pill in Averting Teen-Age Pregnancy,* New York Times, Nov. 3, 1994, at B14.

[54] *See* Smith and Easton, *supra* n. 47, at 26 (noting that politicians push Norplant rather than encourage expectations that young women learn to manage their sexuality and be responsible for their own reproduction); *see also*, Dorothy Roberts, *Norplant's Threat to Civil Liberties and Racial Justice,* N.J.L.Jour., July 26, 1993, at 20 (history of devaluation of black procreation, such as history of sterilization abuse, provides wealth of hindsight with which to judge potential dangers of biological solutions to social problems).

[55] The Alan Guttmacher Institute, *supra* n. 47, at 2.

[56] *Id.* at 4. In addition, in at least five cases, judges have made Norplant a condition of probation for women convicted of child abuse. *Id.* at 5.

[57] Smith and Easton, *supra* n. 47, at 26.

[58] *Id.* at 28.

[59] *See generally* Dorothy Roberts, Civil Liberties, *supra* n. 54 (noting the history of the eugenics movement that encouraged sterilization to prevent reproduction by women likely to produce undesirable children, and cautioning about the risk that Norplant will desensitize the public to future government programs that may seek to limit births in certain populations).

[60] Dorothy Roberts, Civil Liberties, *supra* n. 54. Still another issue to monitor is the prevalence of forced Cesareans. In 1987, a New England Journal of Medicine study found that 17 out of 21 cases of court-ordered obstetrical interventions involved women of color. Veronica E.B. Kolder, *et al.*, *Court Ordered Obstetrical Interventions*, 316 N.E.J.Med. 1192 (1987).

[61] Kary L. Moss, *Forced Drug or Alcohol Treatment for Pregnant and Post-Partum Women: Part of the Solution or Part of the Problem?*, 17 New Eng. J. on Crim. & Civ. Confinement 1 (1991).

[62] It is also important to recognize that class is an additional factor that can compound the effects of race and gender.

[63] *Supra* at 4. *See* Cassandra Q. Butts, *The Color of Money: Barriers to Access to Private Health Care Facilities for African-Americans*, 26 Clearinghouse Rev. 159, 161-162.

[64] *Id.* at 162 n. 24.

[65] Agency for Health Care Policy and Research, Statistics on Diagnoses and Procedures for Blacks in U.S. Hospitals, Highlights: Hospital Cost and Utilization Project no. 40 (July 1994).

[66] Wilhemina A. Leigh, *supra* n. 11, at 22-23. Interestingly, Asian and Pacific Islander women and Cuban American women, along with white women, recorded the highest rates of early prenatal care. *Id.*

[67] J. William Eley, et al., *supra* n. 25.

[68] Wilhemina A. Leigh, *supra* n. 11, at 9. Indeed, some women of may risk abuse from a partner if she displays "too much" knowledge about sex.

[69] Wilhemina A. Leigh, *supra* n. 11, at 9, 17.

[70] *Id.* at 9, 16. *See also* Arthur Chen, et al., *Special Health Problems of Asians and Pacific Islanders* in Clinical Preventive Medicine (R. Matzen and R. Lang eds. 1993). *See generally, Cross-Cultural Medicine A Decade Later,* West. J. Med., September 1992.

[71] Judy Scales-Trent, *supra* n. 1, at 1362.

[72] Jane Perkins, *Race Discrimination in America's Health Care System,* 27 Clearinghouse Rev. 371 (1993).

[73] National Institutes of Health, Office of the Director, Office of Research on Women, Summary of FY 1993 ORWH Research Supplements (1994).

[74] National Institutes of Health, Office of the Director, Comprehensive Report of the Office of Research on Women's Health, Fiscal Years 1991-1992.

[75] National Institutes of Health, Office of the Director, Office of Research on Women's Health, Overview Office of Research on Women's Health, (August 1994).

[76] *See, e.g.,* Ruth E. Zambrana, *supra* n. 8, at 152.

[77] Although this article primarily focuses on NIH, other federal research entities should also explore additional efforts to ensure adequate representation of women of color in research.

[78] Jane Perkins, *supra* n. 72, at 377.

[79] Title VI prohibits discrimination based on race, color, and national origin in any federally funded program. *See generally* Kenneth Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 Hastings L.J. 137 (1978) (describing history of Title VI and extent of enforcement efforts in health care discrimination cases).

[80] Department of Health and Human Services, Office of Civil Rights, Resolution Agreement, OCR Dk. no. 02-94-7801 (March 1, 1994) (hereinafter referenced as "Resolution Agreement"). *See* Ronald Sullivan, *2 Hospitals are Accused of Segregating by Race*, The New York Times, May 20, 1994, at B3.

[81] *Supra*, n. 79.

[82] Under the Hill-Burton program, public and non-profit, private facilities can receive federal grants, loans, or loan guarantees for expansion, construction, and modernization of their facilities. Those facilities who receive such funds must agree not to discriminate on the basis of race, color, or payment method. *See* Kenneth Wing, *supra* n. 79, at 143-144; Cassandra Q. Butts, The Color of Money: Barriers to Access to Private Health Care Facilities for African-Americans, 26 Clearinghouse Rev. 159, 165 (1992).

[83] Resolution Agreement, *supra* n. 80, at 4.

[84] *Id.*

[85] *Id.* at 8-9.

[86] Department of Health and Human Services, Office of Civil Rights, Settlement Agreement, OCR Dk. no. 04-94-7801 (September 9, 1994) (hereinafter referenced as "Settlement Agreement"). In addition, the Center for Reproductive Law and Policy filed a civil suit on behalf of women prosecuted under the policy. *See Ferguson v.*

City of Charleston, South Carolina, No. 2-93-2624-2 (D.S.C. filed Oct. 5, 1993). The suit, which is still pending, charged that the policy was racially discriminatory and violated several constitutitonally-guaranteed protections. *South Carolina Hospital Arrest Policy Dropped Under Agreement with Office of Civil Rights,* Reprod. Free. News (Ctr. for Reprod. Law & Pol., New York, N.Y.), September 23, 1994, at 4.

[87] Settlement Agreement, *supra* n. 86, at 1. *See* Philip J. Hilts, *Hospital Put on Probation Over Tests on Poor Women,* The New York Times, October 5, 1994, at B9.

[88] Richard Green, Jr., *MUSC Won't Report Cocaine Use*, Post & Courier, Sept. 7, 1994, at A1.

[89] Philip J. Hilts, *supra* n. 87.

[90] Richard Green, Jr., *supra* n. 88, at A11.

[91] Settlement Agreement, *supra* n. 86, at 1-2.

[92] Settlement Agreement, *supra* n. 86, at 3-4. In addition to the Settlement Agreement, the Medical Center was placed on probationary status for one year by NIH's Office for Protection from Research Risks (OPRR). OPRR concluded that the Interagency Policy, as implemented by the Medical Center, constituted human subjects research that had not been approved in accordance with HHS regulations. In support of its decision, OPRR cited a medical journal article authored by Medical Center personnel that reported preliminary results from the Interagency Policy's implementation and promised another report after an additional 12 months of data collection. OPRR argued that the description in the article, particularly the expressed intention to report additional results, suggested that the Interagency Policy was a vehicle for research on drug-addicted pregnant women and constituted human subjects research. OPRR has directed the Medical Center to undertake corrective action and seek appropriate approval of any future such research.

[93] It should be noted that the Administration sought to address this problem in the context of health care reform by including a antidiscrimination provision that would cover sex discrimination in the health care system.

[94] Public Law 103-62.

[95] Congressional Caucus for Women's Issues, Summary of Legislative Action in the 103rd Congress (1994).

[96] *Id.*

[97] *Id.*

[98] Congressional Caucus for Women's Issues, FY95 Appropriations Highlights.

[99] Congressional Caucus for Women's Issues, Summary, *supra* n. 95, at 1.

[100] *Id.*

[101] Judy Scales-Trent, *supra* n. 1, at 1368.

Chapter XXI

ADA and the Clinton Administration

by Charles D. Goldman

I. Overview and Background

During his campaign, candidate Clinton promised "to work to ensure that the Americans with Disabilities Act (ADA) is fully implemented and aggressively enforced — to empower people with disabilities to make their own choices and to create a framework for independence and self-determination."[1]

The Clinton Administration, through the Vice President's National Performance Review, has developed governmental reform recommendations that could and should have been applied to help carry out the campaign pledge. These include making greater use of alternative dispute resolution (a practice specifically encouraged by the ADA), as well as more use of regulatory negotiation.

Nevertheless, the Equal Employment Opportunity Commission (EEOC) and the United States Department of Justice (DOJ), the two key federal agencies empowered to implement the ADA, for the most part have been doing business as usual during the first two years of the Clinton Administration, almost totally unaffected by the recommendations of the Vice President's initiatives to reinvent government. Both agencies have been overburdened with a multitude of complaints — more complaints than they can pursue. Both entities engage in only sporadic formal enforcement, initiating relatively few lawsuits and intervening in a few other cases filed by private parties.

In short, at this point, the Clinton campaign promise to vigorously enforce the ADA has been shattered. It is unfulfilled rhetoric. The Clinton Administration has likewise failed to apply its own principles of "good government" to the ADA. It has not meaningfully utilized alternative dispute resolution techniques. Discussed below is the Administration's record with respect to the basics of the ADA: (1) employment discrimination; (2) discrimination by state and local governments; and (3) discrimination in places open to the public, places of accommodation, and commercial facilities.[2]

II. ADA: Scope of the Law

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990. In general, the Act covers persons with physical or mental impairments that substantially limit a major life activity, persons who are regarded as having such impairments, and persons who have a record of such impairments.[3] Under the Act, major life activities include working, seeing, hearing, walking, breathing, learning, caring for oneself, and performing manual tasks.[4] Persons with AIDS or who are HIV positive, and recovered or recovering drug addicts and alcoholics are also afforded the Act's protection. Active users of illegal drugs are not protected.

Title I of the ADA, the mandate for equal employment opportunity, is administered by the Equal Employment Opportunity Commission. As of July 26, 1994, Title I covers entities with 15 or more employees.[5]

Titles II and III of the ADA, which went into effect on January 26, 1992,[6] are administered by the Department of Justice. These titles cover nondiscrimination in state and local government entities (and AMTRAK), and places of public accommodation and commercial entities, respectively. Under both Titles II and III, persons with disabilities are entitled to have nondiscriminatory access to programs and services, including licensing and credentialing courses and examinations. Under ADA, to achieve program access, structural barriers are to be removed where it is readily achievable to do so, and new structures and alterations are to be made accessible in accordance with standards prescribed by the Department of Justice.

When adopting the ADA, Congress mandated the federal government to issue rules coordinating the implementation and enforcement of the ADA with the Rehabilitation Act of 1973,[7] which, among other things, prohibits discrimination against persons with disabilities by recipients of federal financial aid and requires government contractors to take affirmative action in employment practices.[8]

III. ADA Regulatory and Policy Actions of the Clinton Administration

When reviewing the actions of the Clinton Administration with respect to the ADA, several points stand out:

A. The Bush Administration met the major deadlines for ADA rules by having the regulations implementing Titles I, II, and III finalized by July 26, 1991.[9] In addition, the regulation coordinating ADA, Title I and Rehabilitation Act, Section 503 (requiring affirmative action by government contractors) was timely published in the Federal Register on January 24, 1992.[10] This was within the ADA's timeframe, under which coordinating regulations designed to avoid duplication or the application of inconsistent standards were to be promulgated by January 26, 1992. By contrast, it took the EEOC and the Department of Justice until August 4, 1994, well after the statutory deadline, to issue a regulation providing for the coordination of the prohibitions against employment discrimination in ADA, Title I and Rehabilitation Act, Section 504 (addressing discrimination by recipients of federal financial assistance).[11]

B. This latter ADA coordination rule was adopted following conventional rulemaking processes, with no effort to invoke an alternative rulemaking process. Use of the conventional rulemaking methodology resulted in extreme delays, far exceeding statutory deadlines — even in the face of minimal (10) comments from the public.

C. The Clinton Administration came to office with the stated intention of making government work for people, avoiding duplication, and making agencies work together. These goals were embodied in the Vice President's National Performance Review, which contained key policy recommendations that could have been applied to, and were consistent with, the ADA. These included recommendations that agencies expand their use of alternative dispute resolution (ADR) techniques, and make greater use of negotiated rulemaking.[12] Nevertheless, as discussed above, with respect to a basic — but mandated — coordination rule, no effort was made to invoke the regulatory negotiation process; nor, as discussed below, has sufficient use been made of ADR techniques.

D. Key EEOC pronouncements on nondiscriminatory health insurance (discussing practices that could violate the ADA) and preemployment interviews and examinations (identifying interview questions that may or may not be asked, as well as the circumstances under which physical exams may be administered to employees and applicants for employment) have been issued without benefit of any public dialogue process or other public input. While each of these pronouncements address internal EEOC guidelines, nevertheless, each elaborated upon issues vital to the independence and self-determination of persons with disabilities. These subjects generated heated, itinerant correspondence from the public to the EEOC and extensive coverage in the trade media. Yet EEOC made no formal regulatory pronouncements, conducted no hearings, and solicited no public comment.

E. Finally, the rulemaking delay and techniques did not provoke any hue and cry from Congress, which as of the close of 1994 had failed to conduct a single oversight hearing on the implementation of the ADA.

IV. ADA and Litigation/Enforcement

Although both the EEOC and the Justice Department have been inundated with complaints under ADA, the participation by those agencies in litigation has been extremely limited. Nor do the agencies appear to have any coordinated overall litigation strategy — while literally thousands and thousands of complaints and charges remain unresolved.

According to the EEOC Office of Program Operations, as of September 30, 1994, the EEOC had received a total of 34,877 charges (complaints) under the ADA. Of these, the EEOC has been involved as a party, as plaintiff (37 cases) or as an *amicus* (six cases), in a total of 43—or roughly one-tenth of 1% of the charges. In other words, a charge with the EEOC under ADA had about a one in 1,000 chance of winding up in court with or at the behest of the EEOC!

Nor does the EEOC litigation docket mirror the charges received by the agency. According to the EEOC Office of Program Operations, roughly 50% of the charges filed at the EEOC involve termination of the charging party, while those types of cases represent roughly 25% of the litigation load. In only 11% of the ADA charges received by the EEOC, and 29% (11 of the 37) cases filed by the EEOC were hiring issues involved. This is not too surprising when read in the context of a recent report that the number of disabled persons entering the workforce has not increased significantly since the passage of the ADA.[13]

Discriminatory health insurance benefits issues are raised in approximately 4% of the charges filed with the EEOC, but represent approximately 25% of the EEOC court cases. AIDS/HIV issues are raised in roughly 2% of the EEOC charges, yet 13 of the 37 EEOC-initiated litigated cases focus on AIDS-based discrimination.

Furthermore, the EEOC has failed to use its pilot Alternative Dispute Resolution (ADR) program effectively. This project involved EEOC offices in Washington, D.C., Philadelphia, New Orleans, and Houston, and was limited to charges involving discharge, discipline, and other discrete terms and conditions of employment. Of a total of 1,282 charges considered (including a control group of 362), each involving the ADA and other civil rights laws (specifically Title VII of the Civil Rights Act and the Age Discrimination in Employment Act), 87%, or 796, of the charging parties accepted mediation. In 309 of the 796 charges, both sides agreed to mediation. Of these, 17 settled, 33 mediations were cancelled due to failure of a party to show, and 259 proceeded to mediation. Ultimately, 139 agreements were reached, overwhelmingly in discharge cases. At this point, EEOC's data on the program is very preliminary, unrefined and unpublished. For example, EEOC has not even identified the law — ADA or other — involved in the successfully mediated cases. Furthermore, no current ADR is underway at any of the EEOC offices, nor is any planned.[14]

EEOC also reports that it has "resolved" 17,062 of the 34,877 complaints, or slightly less than 50% of ADA charges filed. However, a closer examination reveals this to be a somewhat illusory picture of success. The reality is that actual relief has been obtained in about 8 3/4% of all charges filed.

Of the 17,062 charges that EEOC considers "resolved", 36%, or 6,111, are cases in which EEOC has made a determination of no reasonable cause. EEOC closed another 7,593 charges (44%) for various procedural reasons, such as lack of jurisdiction, withdrawal by the charging party, or lack of cooperation by the charging party.

EEOC states that it reached resolution on the merits in 3,358, or 20%, of the matters it closed. However, that figure includes 307 matters that were unsuccessful conciliations, where reasonable cause was found but agreement was not achieved, and the charge was referred to EEOC headquarters for litigation consideration. EEOC does *not* report obtaining actual benefits or relief for the charging party in these cases. Accordingly, it is submitted that these 307 cases are not appropriately considered merit resolutions. Excluding these 307 cases, the total number of merit resolutions is 3,049, or 17.87%, of the total closures and 8.74% of all charges filed.

Unlike the EEOC, the Justice Department's public pronouncements on the ADA do not provide cumulative information. Also unlike the EEOC, DOJ does not put forth information quantifying the nature of the complaints received or the disabilities of the complaining party.

The Department of Justice has reported that as of September 19, 1994, it had received a total of 2,876 complaints under Title II of the ADA, with DOJ the lead investigatory agency in 1,313 of these complaints, and other federal agencies, principally the Departments of Education, Transportation, and Health and Human Services investigating the balance.[15] The Department received 2,796 complaints under Title III of the ADA, and opened 1,635 of them for investigation. Of these latter cases, some 549 have been closed, leaving two-thirds open and unresolved.[16]

The Department of Justice informally follows alternative dispute techniques, by attempting to resolve matters before filing a lawsuit. The Department has had several high profile settlements, such as those involving telecommunication devices for the deaf in the government offices of Berkeley, California and in the Empire State Building in New York City, brought under Title II, as well as the practices of a national car rental company challenged under Title III.[17]

Although the Department of Justice has recently awarded grants for formal use of alternative dispute resolution under Title III, the Department is not making formal use of mediation, arbitration, or other alternative dispute resolution techniques for Title II matters. Under one DOJ grant, much like with the EEOC pilot program, a set number of matters (in this case, 200) was slated for ADR. Unlike EEOC, however, there was no control group of complaints. Also, the Department of Justice has not forwarded any complaints for mediation under this grant.

While the Department of Justice, unlike the EEOC, does not tabulate and report its complaints by disability, its public pronouncements indicate that it is pursuing and resolving matters related to accessibility of structures, particularly the absence of telecommunication devices for the deaf, as well as policies and practices of places of public accommodation which run afoul of Title III. The Department of Justice reports show less involvement on behalf of persons with vision impairments and persons with AIDS.[18]

The Department of Justice reports that it has resolved 19 matters under Title II and 13 under Title III by means of a formal settlement agreement without filing a lawsuit in court.

The Justice Department has filed 10 *amicus* briefs under Title II and one *amicus* brief under Title III. It has initiated no lawsuits under Title II, and six under Title III (and intervened in two others). It has reached no consent decrees under Title II and four under Title III. The Department also reports that it has filed one case of employment discrimination against a city under Title I.[19]

The bottom line is that while the Department of Justice has resolved some complaints without formal proceedings, in less than one-half of 1% of the complaints it received (24 of 5672) did the Department file anything — brief, lawsuit, consent agreement — in court.[20]

V. Recommendations

1. Regulatory negotiation and alternative rulemaking techniques, such as the use of advisory committees, should be used to accelerate the development of major policy initiatives under the ADA. This is especially true with respect to major policy guidance from the EEOC.
2. The full Equal Employment Opportunity Commission should issue a report on the agency's experience with alternative dispute resolution.

Information on ADR is available within the bowels of the EEOC. It is time for a top-level review and report on the subject.

3. The Department of Justice and the EEOC each need to be more vigorous in the use of alternative dispute resolution. ADR should be part of the standard operating process of these two agencies. Alternative dispute resolution should be available to all complainants and respondents under Titles I, II, and III of the ADA. The backlog of complaints is simply too great to leave them to conventional processing by the agencies; mediation or arbitration could help significantly.
4. In the short run, Congress and the Clinton Administration need to make additional resources available to the EEOC and the Department of Justice to address the backlog of complaints, investigations, and inquiries. Such resources could include a supplemental appropriation, use of United States Attorneys, and detailing of competent attorneys, investigators, and technical staff from other federal agencies. It may also be necessary to contract out for assistance to address the ADA backlog.
5. The Department of Justice should revise its public information system and produce comprehensive cumulative reports on its efforts under the ADA. These reports should also be disability-specific, so that the information gathered can be used in other areas.
6. Congress needs to conduct oversight hearings on the implementation of the ADA. Not a single oversight hearing has been held since the law's passage in 1990. Congress must call the EEOC and the Justice Department to account for the quantity as well as quality of their actions. Congress must also review the amicable resolutions achieved by the EEOC and the Department of Justice, both in court and voluntarily reached without legal process, as well as the litigation scorecards of the agencies. The agencies' management of ADA, including organizational structures, resources, contractual practices, and capabilities, must be scrutinized. Congress must determine the adequacy of resources provided to carry out the mission, and whether resources and strategies utilized by the EEOC and the Department of Justice have been sagaciously utilized or institutionally mismanaged.
7. Enforcement and implementation of the ADA must be adequately funded. Successful, balanced implementation and enforcement of the ADA takes both leadership and financial resources. Both the President and Congress must ensure that funds for the ADA are commensurate with the responsibilities mandated.

Endnotes

[1] Bill Clinton & Al Gore, Putting People First, at '82 (1992).

[2] Pub.L. 101-336, 42 U.S.C. Sec. 12101, *et seq*.

[3] 42 U.S.C. Sec. 12102.

[4] 42 U.S.C. Sec. 12210, 29 CFR Sec. 1630.2(i).

[5] 42 U.S.C. Sec. 12111(5), 29 CFR Sec. 1630.2(e).

[6] 42 U.S.C. Secs. 12131 and 12181 note.

[7] 42 U.S.C. Sec. 12117(b).

[8] 29 U.S.C. Sec. 793 and 29 U.S.C. Sec. 794.

[9] 29 CFR Part 1630, 28 CFR Part 35, 28 CFR Part 36.

[10] 29 CFR Part 1641, 41 CFR Part 60-742.

[11] 28 CFR Part 37, 29 CFR Part 1640.

[12] United States National Performance Review, From Red Tape to Results: Creating a Government that Works Better and Costs Less: Report of the National Performance Review, (1993) at 117, 74.

[13] October 23, 1994. *In 4 Years, Disabilities Act Hasn't Improved Jobs Rate,* The New York Times.

[14] Interview with Donna Swanson, Office of Program Operations, October 1994.

[15] U.S. Department of Justice, Enforcing the ADA: A Status Report from the Department of Justice, (April 4, 1994); Enforcing the ADA: A Status Report Update from the Department of Justice, (April-June 1994).

[16] U.S. Department of Justice, Civil Rights Division, Office of Coordination and Review, Weekly Report, (September 25, 1994.)

[17] Enforcing the ADA, *supra*.

[18] *Id.*

[19] *Id.*

[20] *Id.*

Chapter XXII

Another Take on "ADA and the Clinton Administration"

by Chai R. Feldblum

Many of the recommendations proposed by Chuck Goldman in "ADA and the Clinton Administration" are legitimate. A few qualifications, however, are in order.

First, of all the recommendations put forth by Goldman, the most important one is to ensure greater resources for the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) in their efforts to implement the Americans with Disabilities Act (ADA). In the current Congressional and Presidential climate, however, such an increase in resources will be hard to come by. Moreover, if the civil rights community is to focus its energies effectively on Congress and the Administration, of greater import at the moment is ensuring that the substantive provisions of the ADA and of the Individuals with Disabilities Education Act (IDEA)remain intact. This is of much greater importance in the long-term than increasing money and resources in the short-term.

Second, while use of alternative dispute resolution (ADR) mechanisms should be explored and encouraged, it is critical that such mechanisms be developed *appropriately* so that the inherent power differential between an employer and employee (or a business owner and a customer) will not be exploited against the person with the disability. One of the reasons ADR mechanisms are not yet in full swing is because there is not yet a consensus about how such mechanisms should be framed. The grants issued by the EEOC and the DOJ were designed to answer some of these questions.

Third, DOJ should certainly produce cumulative reports on its efforts under the ADA and should compile statistics on the type of disabilities being alleged in its charges. In addition, oversight hearings on implementation of the ADA could be useful if they demonstrated that the difficulty in implementing the ADA has been overblown. However, given the current Congressional climate, an oversight hearing on the ADA might well be skewed to demonstrate why aspects of the ADA should be repealed.

As for the ADA implementation efforts by the EEOC and the DOJ, one of Goldman's main complaints with the EEOC focuses solely on the absolute numbers of charges filed and how they were dealt with — with no effort to factor in the potential merit or lack of merit in these charges. Indeed, the EEOC's statistics on the "resolved" charges explain that 36% of 17,062 charges show no reasonable cause to indicate discrimination and that 44% of those charges fail for lack of jurisdiction, withdrawal by the charging party, or lack of cooperation by the charging party. These statistics demonstrate the need for sophistication in using absolute numbers of charges to draw conclusions about the effectiveness of an agency's implementation efforts.

As for the cases in which EEOC has filed briefs, the goal should not be to determine whether the cases in which the agency has filed briefs match precisely the type of charges filed with the agency (which necessarily include both meritorious and non-meritorious charges). In deciding whether to file a case, an agency presumably should analyze the chances of success (e.g., it is much easier to win a termination case than a failure-to-hire case because of the difference in proof available) and the extent to which the case will have a far-reaching effect for people with disabilities. The docket of EEOC cases is relatively impressive.

Moreover, it should come as no surprise that DOJ has filed few lawsuits. The agency has intentionally focused its efforts on investigations and settlements. (Ironically, this is precisely the type of ADR mechanism called for by Goldman — although one that corrects for the power differential by substituting the government for the private plaintiff.) It is a pretty impressive statistic that DOJ has opened investigations in 1,635 complaints. The sense of many disability rights advocates is that the will to effectively enforce the ADA exists at the DOJ, just as it exists at the EEOC — but that resources remain a constant limit on the amount of enforcement that can go on.

Goldman states that "DOJ reports show less involvement on behalf of persons with vision impairments and persons with AIDS." He is correct that it would be useful to receive from DOJ a compilation of the type of disabilities alleged in its charges and the outcome of those charges. (This could be done while still maintaining confidentiality of those charges.) Without such information, however, we cannot conclude that the agency has focused less on certain disabilities. (In addition, DOJ has been quite aggressive on behalf of people with HIV denied services by dentists. The agency negotiated a favorable settlement in a medical services discrimination case that should have wide-ranging effect across the nation.

In sum, much more needs to be done to ensure effective implementation of the ADA in the coming years. The Clinton Administration has been helpful in one respect and less helpful in another. The Administration has been helpful in giving support to those civil servants who have been at the EEOC and the DOJ in previous Administrations and who care about the ADA. People such as Peggy Mastriani and John Wodatch (the respective heads of the ADA departments in the EEOC and the DOJ) have always cared about ADA implementation. A Clinton Administration has ensured that such individuals receive greater support and encouragement for their efforts. (This is most evident at the DOJ where Assistant Attorney General for Civil Rights, Deval Patrick, has been an outspoken supporter of the ADA. At the EEOC, Gilbert Casellas, Chair of the EEOC, has not yet had an opportunity to develop any agenda.)

By contrast, the Clinton Administration has not been particularly helpful in significantly increasing resources for implementation of the ADA either at the EEOC or the ADA. Moreover, the Administration was woefully negligent in failing to appoint a Chair of the EEOC for more than two years. That failure probably had more of an adverse effect on the implementation of the ADA (and other civil rights laws) than most other actions taken by the Administration. The diversity politics surrounding that appointment, at the cost of civil rights implementation, were no less than embarrassing.

In terms of the future, the true test will be how the Clinton Administration responds to attacks on disability civil rights in the new Congress. There is talk of efforts to cut back on the reach of the ADA and of IDEA, the special education law. The Clinton Administration needs to overcome its perceived tradition of ducking hard policy questions — and work vigorously to protect civil rights for all people with disabilities.

Chapter XXIII

Electronic Redlining: Discrimination on the Information Superhighway

by James J. Halpert and Angela J. Campbell

I. Introduction and Background

The next several decades will see an evolution of once-distinct communications media — television, computers, telephones, broadcasting, and related technologies — into a powerful, flexible nationwide communications system often called the National Information Infrastructure (NII). The NII is also known more popularly as the Information Superhighway.

The development of the NII may prove as important as the rise of radio and television earlier in this century. It promises to exert enormous influence over our country's economic development, politics, and transmission of knowledge. The NII will change — for better or worse — how Americans learn, work, communicate with each other, and exercise their rights as citizens. As the Clinton Administration proclaimed in issuing its National Information Infrastructure Agenda for Action in September 1993, "All Americans have a stake in the construction of an advanced National Information Infrastructure (NII), a seamless web of communications networks, computers, databases, and consumer electronic that will put vast amounts of information at users' fingertips."[1]

It is far from clear, however, whether all Americans will have access to the NII. The Administration's policy relies primarily on the private sector to develop and deploy the NII, in large part because of the massive investment the NII requires.[2] While it is difficult to obtain accurate cost estimates because of technical and market uncertainties, a recent estimate puts the cost at $240 billion.[3]

Many different industries — computer, cable television, satellites, broadcasting — are expected to play a role in the development of the NII. It is clear, however, that the telephone companies, especially the seven, large Regional Bell Operating Companies (RBOCs), intend to play a major role.[4] With combined annual revenues of approximately $70 billion,[5] the RBOCs are particularly well positioned to be major players in the NII. The RBOCs already provide local telephone service to a majority of homes nationwide.[6] Over the next 15 to 20 years, they are expected to invest $100 to $200 billion to upgrade existing telephone facilities to provide a nationwide fiber network.[7]

The local telephone companies have actively sought to expand beyond their traditional role as providers of "plain old telephone service" to offer video programming. Some have made major investments in existing cable companies outside their service areas.[8] However, the local telephone companies have principally sought to enter the video market by providing video service over telephone company-owned wires and equipment in competition with cable television companies. This latter service is known as "video dialtone."

A. What is Video Dialtone?

The term "video dialtone" is derived from the regulatory scheme established by the Federal Communications Commission (FCC) under which telephone companies will be able to offer video programming to consumers. Video dialtone service represents a primary step in the development of our national information infrastructure. Video dialtone is

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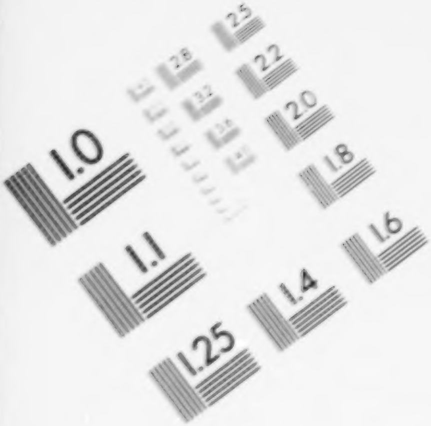
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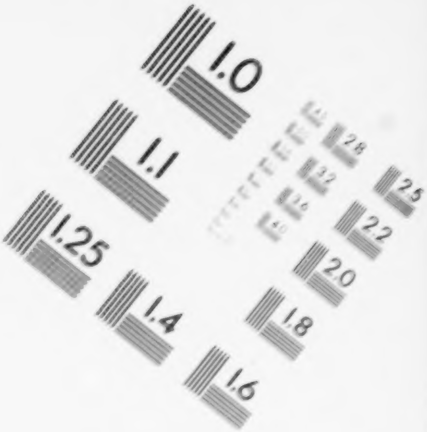
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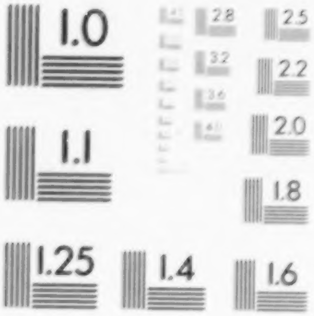
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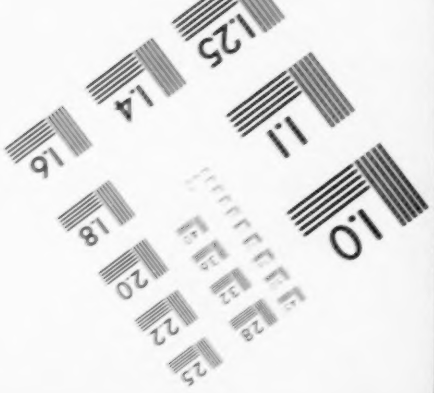
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a more flexible and powerful version of cable television delivered via telephone company-owned wires and equipment. First, video dialtone systems can have far greater capacity, so that much more programming and other information can be carried. Second, video dialtone systems can carry voice, data, and audio services, in addition to video. Third, and most importantly, video dialtone has the capacity to offer interactive service, meaning that signals can flow not only from the program provider to the customer, but from the customer to the program provider. Indeed, it is expected that video dialtone systems can be "switched," meaning that video signals may be sent and received among customers, much in the way that voice telephone calls are today. While the technology is not fully developed to allow such switching to be offered commercially at present, the potential exists for average persons to become producers as well as recipients of video programming and other forms of information. Due to its interactive possibilities, video dialtone offers the potential for a wide variety of innovative services and uses. Thus, video dialtone should be able to compete with, and may even supplant, existing telephone service, broadcast television, and cable television.

Current law prohibits telephone companies from providing video programming directly to customers in the same areas where they provide telephone service.[9] However, beginning in 1987, the FCC sought unsuccessfully to have Congress repeal this limitation.[10] Unable to obtain legislation, it devised rules that gave the telephone companies as much relief as possible.[11] The video dialtone rules permit telephone companies to offer video programming to consumers on a common carrier basis. This means that a telephone company cannot itself directly provide the programming, and it must offer transmission services to other program providers on a nondiscriminatory basis.

Common carrier status also means that telephone companies will be subject to various FCC regulations. For example, as common carriers, the telephone companies seeking to offer video dialtone must obtain approval from the FCC before constructing the facilities. To grant approval, the FCC must find that the proposal serves the "public interest, convenience, and necessity."[12] However, telephone companies providing video dialtone service are exempt from the local franchising requirements that apply to cable television.[13]

Several of the RBOCs have already filed video dialtone applications with the FCC. Because of the tremendous investment required, the RBOCs cannot deploy video dialtone throughout their service area all at once. As described below, the initial applications tend to serve areas with higher income and small proportion of minorities, in some cases bypassing minority and low income communities all together. Such refusals to invest or delays in investing in minority neighborhoods have been termed "electronic redlining."

B. Electronic Redlining and Why It Matters

Several of the RBOC video dialtone applications filed with the FCC have displayed clear patterns of dodging or bypassing minority and low income communities, in sometimes bizarrely shaped deployment patterns. A study by Dr. Mark Cooper of the Consumer Federation of America indicated sharp contrasts in race and income between areas included in and excluded from carriers' proposed service areas.

Among the most striking was Ameritech's proposal to deploy video dialtone service in the Chicago area almost exclusively to wealthy, overwhelmingly white suburbs. Ameritech's proposed service area winds in an often narrow band through the Chicago suburbs, frequently dodging areas with more substantial minority populations. Dr. Cooper found that African Americans and Latinos comprise only 8% of the population in the proposed service area, but 22% of the population in the Chicago metropolitan area as a whole. The average household income of the areas Ameritech plans to serve initially is $51,100, while the average household income of unserved areas is $35,265.

Problems of discriminatory deployment of video dialtone service illustrate the potential threat of discrimination in delivery of other advanced services over telephone, cable or utility wires, and facilities. These patterns in video dialtone deployment thus far are reminiscent of problems in the deployment of cable services in urban areas. At least until passage of anti-redlining protections in the 1984 Cable Act, low-income and minority neighborhoods were in many localities among the last to receive cable services. As one court remarked in 1991, "cable operators tend to bring cable service to low-income areas at a much slower rate than to other areas."[14] Congress found cable redlining to be sufficiently severe that in the 1984 Cable Act it obliged authorities awarding cable franchises to "assure that access is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[15]

Refusals to invest or delays in investing in minority neighborhoods have been termed "electronic redlining," after similar patterns in the mortgage lending and insurance industries. Like mortgage and insurance redlining, electronic redlining occurs when a carrier refuses to invest in a neighborhood. Advanced telecommunications services that are transmitted over wires (as opposed to through satellite and other wireless broadcast systems) depend upon major, localized investments to upgrade the wiring that carries the service. Until a carrier invests to upgrade the wires running into a community, that community does not receive advanced service. Patterns of discrimination may be much slower to remedy than in the mortgage lending or insurance contexts. Upgrading wire is very costly (far more expensive, for example, than opening a bank branch office), and is expected to take decades. Thus the threshold investment necessary to provide any service to a neighborhood is a substantial barrier to service.

Discrimination in deployment of telecommunications services presents a fundamental challenge to equal opportunity over the next several decades. If the predictions of the Regional Bell Operating Companies are accurate, telecommunications technologies will become faster, more flexible, and will permit point-to-point transmission of video, voice, data, and graphics.[16] As interactive technologies make the NII a rich medium of two-way communication, and an increasing amount of important information is delivered "on-line," differential access to the NII could very easily divide American society.

Access to video dialtone and related advanced telecommunications technologies is likely to convey a broad array of social benefits to users. These technologies will be able to do far more than offer the home entertainment and home shopping programming that dominates today's television programming. The NII is expected to play an important role in the following areas, among others:

- *Education.* The NII should be capable of permitting schools and colleges to share and to originate educational programming.[17] It should give students in disadvantaged areas the option of taking classes in distant locations, vastly expanding their choice of learning opportunities.[18]
- *Health care.* Advanced telecommunications services are expected to provide better, more rapid and more convenient health care, especially for the elderly, the disabled and low-income citizens living in areas underserved by the medical profession. We are already seeing the advent of "telemedicine" in which doctors in central locations assist and advise doctors in remote locations about complex treatments and diagnoses. The technologies should also permit rapid in-home screenings of patients by video-conferencing to determine whether their condition requires traveling a substantial distance for treatment or further diagnosis.[19]
- *Economic Development.* The NII will permit businesses to send a greater amount of information more quickly and more efficiently to suppliers and customers. Many companies will prefer to locate in areas with superior telecommunications infrastructure.[20] As newspaper services migrate on-line, advanced networks may also become the principal source of job listings and announcements.
- *Democratic Participation.* The NII may do much to reinvigorate representative democracy. Voters

> will likely be able to register from home, communicate with elected officials, browse at their own pace through accessibly presented information regarding candidates and ballot issues, and participate in public hearings and other vibrant forums for public discussion of major issues.[21]

Already, prototypes of such services are being developed, although they have not yet been widely disseminated.[22]

Thus, advanced telecommunications networks hold great promise. However, it is precisely these important potential benefits that make unequal availability of advanced telecommunications technology a threat to equality. Minority and low-income areas may well lag far behind the rest of our country in access to advanced telecommunications services. Some communities may never receive access. If either scenario proves true, the much-vaunted advent of the "Information Age" may actually aggravate differences in opportunities that already separate advantaged and less advantaged Americans. The NII may merely place minority and low-income Americans at a further disadvantage in the classroom, in the job market, in business and in the political process. For example, as Ameritech Vice-Chairman Richard H. Brown stated regarding the economic development implications of access to advanced telecommunications services:

> If rural communities as well as any economically disadvantaged areas are to participate fully in today's economy, they must have access to the same advanced telecommunications capabilities that are available in [most] urban areas.[23]

Conversely, advanced telecommunications services have the potential to be a force for equality. They permit users to bypass deficient infrastructure — libraries, schools, hospitals, etc. — in their own neighborhoods and to tap into superior infrastructure elsewhere. For example, rather than being limited to the resources of a crumbling local library, a user in a disadvantaged area may be able to browse through the collection of the Library of Congress.

Advanced telecommunications can likewise bridge distances. This capacity can be particularly helpful for low income Americans, who frequently do not own cars and who are often poorly served by public transportation. To pick one example, rather than travelling a substantial distance to appear in person at a job training or government benefits office, a client could communicate by video conference.[24] Advanced telecommunications services may also serve as a force for community building by offering a "new public square" in which people can discuss matters of concern to their communities.[25] In an engaging format, this sort of programming offers rich potential for organizing communities to address critical needs.

Above all, advanced telecommunications services have the potential to convey large amounts of information into the home and to public institutions in a convenient and accessible format. For disadvantaged Americans, who frequently have difficulty obtaining helpful information about government services, job openings, health care, etc., this capacity could be particularly important.[26]

However, disadvantaged communities will only derive these benefits if the carriers that build the new system offer service in those communities. In addition, long delays in provision of service to disadvantaged communities could retard even further the development of applications that will be most useful to low-income users.[27]

In short, where it occurs, electronic redlining is an education issue, a health care issue, an economic development issue, and a voting rights issue. Its significance is not felt acutely in the very earliest phases of deployment of advanced telecommunications networks. However, as such networks become more pervasive, communities that are left out would find themselves at a substantial disadvantage *vis-a-vis* communities offered service.

C. Administration Rhetoric Embraces Nondiscriminatory, Universal Deployment of the NII

The Administration sees vast potential for the NII, observing that it "can help unleash an information revolution that will change forever the way people live, work, and interact with each other."[28] The Administration envisions potential benefits in employment opportunities,[29] educational opportunities,[30] delivery of health care services,[31] delivery of government benefits,[32] and increased participation in the democratic process.[33]

The widespread availability of affordable telephone service has traditionally been a core objective of U.S. telecommunications policy. This policy objective, known as "universal service," is expressed in the Communication Act's mandate to the FCC "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[34]

While the concept of "universal service" has traditionally applied to basic telephone service, the Administration has set as a "major objective" the extension of universal service to encompass the NII.[35] The NII Agenda states that the "Administration is committed to developing a broad, modern concept of Universal Service — one that would emphasize giving all Americans who desire it easy, affordable access to advanced communications and information services, regardless of income, disability, or location."[36]

Just as telephone service is essential to participation in society, the Administration recognizes that "[b]ecause information means empowerment — and employment — the government has a duty to ensure that all Americans have access to the resources and job creation potential of the Information Age."[37] Moreover, "[a]s a matter of fundamental fairness, this nation cannot accept a division of our people among telecommunications or information 'haves' and 'have-nots.'" [38]

Vice President Al Gore echoed these themes in his speech at the Superhighway Summit held in January 1994. Responding to a *Washington Post* headline, "Will the 'Information Superhighway' Detour the Poor?" Gore replied: "Not if I have anything to do about it." He elaborated:

> We have become an information-rich society. Almost 100% of households have radio and television, and about 94% have telephone service. Three-quarters of households contain a VCR, and about 60% have cable, and roughly 30% of households have personal computers.
>
> As the information infrastructure expands in breadth and depth, so too will our understanding of the services that are deemed essential. This is not a matter of guaranteeing the right to play video-games. It is a matter of guaranteeing access to essential services.
>
> We cannot tolerate — nor in the long run can this nation afford — a society in which some children become fully educated and others do not; in which some adults have access to training and lifetime education, and others do not.[39]

More recently, in a speech to the National Association of Black-Owned Broadcasters, Vice President Gore reiterated the importance of access for all:

> I've often said that I look forward to the day when a child in my home town of Carthage, Tennessee can come home and — instead of Nintendo — turn on a computer and plug into the Library of Congress.
>
> But we must make sure all children have that access. We must make sure that the children of Anacostia have that access — not just Bethesda. Watts — not just Brentwood. Chicago's West Side — not just Evanston.
>
> That's not the case now. Twenty-two percent of white primary school children have computers in their homes. Less than 7 percent of African American children do.[40]

The Chairman of the Federal Communications Commission, Reed E. Hundt, has publicly embraced these views. For example, in a speech at the Harvard Graduate School of Education, Hundt stated: "If these networks do not reach into every community and bring us together, they could end up dividing us further — leaving whole segments of our country without the skills and information necessary to prosper in our postindustrial economy."[illegible]

Similarly, Chairman Hundt told the Urban League:

> As access to the information highway becomes a stronger determinant of success, those without access will fall farther behind. . . .
>
> That access is particularly critical for children who come from homes that are disconnected from the telecommunications network. More than 15 million Americans live in homes without a phone: these are homes with children. While our telephone network reaches 94% of American households, only 50% of women with children living at or below the poverty line have telephones in their home. Those kids can't explore the information highway at home, or call 911 in the event of an emergency. Both basic access in the home and educational access must be improved.

Hundt concluded:

> Unless we act wisely, the information highway will be like one of those road projects that ripped apart neighborhoods and divided rich and poor. The learning and economic advantages of the information highway might after all separate our country more practically between the haves and the have-nots. It may increase distrust and disadvantage, instead of fostering understanding and opportunity.[illegible]

Thus, in speech after speech, principal communications policy makers of the Clinton Administration have stressed the importance of making the NII available to all Americans.

II. Video Dialtone Petitions at the FCC

Establishing the regulatory framework under which telephone companies could provide video dialtone began under the Bush Administration. In 1991, the FCC issued a Notice of Proposed Rulemaking in which it identified three goals that would be advanced by permitting telephone companies to provide video dialtone. First, permitting telephone companies to provide video dialtone would further the Commission's statutory mandate to "make available nationwide, publicly accessible, advanced telecommunications networks able to provide adequate facilities at reasonable charges."[illegible] Second, it would foster competition in the video and communications market.[illegible] Third, it would foster a diversity of information sources for the American public.[illegible] Civil rights and public interest organizations that follow communications issues supported these goals. However, they questioned whether the ground rules established by the FCC would adequately promote service consistent with these goals.[illegible] One basis for their concern was that the FCC's proposed regulations were overly vague and general.[illegible]

A. FCC Rules Leave Many Unanswered Issues to the Applications Process

Unfortunately, the final rules for video dialtone adopted in the summer of 1992 remained vague and general. The Commission decided to leave a number of important issues to be resolved later when the FCC had specific applications before it.[illegible]

Before a telephone company can construct a video dialtone system, it must apply to the FCC and receive approval. To grant such approval, the FCC must find that the construction of those facilities would serve the public interest, convenience, and necessity.[illegible] This process of application and approval is known as the "214 process" because it is mandated by Section 214 of the Communications Act of 1934. Applications filed by telephone companies under Section 214 should include a full description of the proposed facilities, the economic justification for their deployment, including projected costs and revenues, evidence that the services will comply with FCC rules and policies, and other information necessary to show that the proposed construction will serve the public interest.[50]

B. The First Video Dialtone Applications Are Filed

The first 214 applications filed were for small, experimental systems,[51] and attracted little attention from the civil rights community. However, by the spring of 1994, more than 20 applications had been filed by four of the seven Regional Bell Operating Companies, the major suppliers of local telephone service. The areas of service included portions of major metropolitan areas including San Diego, Los Angeles, Denver, Minneapolis, Chicago, and Washington, D.C.

Examination of the maps of proposed service areas submitted with the RBOCs' applications revealed that in several cases, they had excluded center city areas. For example, the map of US West's scheduled deployment in Denver showed that US West planned to by-pass three exchanges at the center of the map. These areas had the lowest incomes of any covered by the map.[52] Bell Atlantic's initial 214 application proposed to serve Washington, D.C. suburbs in Montgomery County, Maryland and Northern Virginia, but excluded the entire District of Columbia and Prince George's County, both of which contain large minority populations.[53]

Exhibit 1:

Summary Indicators of Electronic Redlining, Income in Served and Unserved Areas

		Video Dialtone Status	
Characteristic	**Company/Area**	**Served**	**Unserved**
Average Household Income	Ameritech/Chicago	51,100	35,265
	Bell Atlantic		
	Washington Metro	66,879	48,615
	Maryland Metro	68,007	48,435
	Virginia Metro	66,020	53,805
	Toms River (NJ)	34,200	37,430
	Pactel		
	Orange County	57,302	46,237
	South Bay	57,913	50,161
	San Diego	51,322	42,080
	Center City	43,627	36,589
	Suburbs	64,489	44,427
	US West		
	Portland Metro	29,949	27,665
	Denver Metro	39,209	38,212
	Center City	32,178	29,518
	Suburbs	38,724	41,686

Exhibit 2:

Summary Indicators of Electronic Redlining, Percentage Minority in Served and Unserved Areas

		Video Dialtone Status	
Characteristic	**Company/Area**	**Served**	**Unserved**
Percentage Minority (Black and Hispanic)	Ameritech		
	Indianapolis Metro	11.1	18.4
	Center City	16.7	35.7
	Suburbs	1.6	.4
	Chicago	8.6	22.1
	Bell Atlantic		
	Washington Metro	17.4	44.0
	Maryland Metro	19.6	44.4
	Virginia Metro	15.8	17.1
	Toms River (NJ)	2.0	12.4
	Pactel		
	Orange County	15.9	24.8
	South Bay	14.6	19.4
	San Diego	10.8	19.1
	Center City	11.2	24.5
	Suburbs	6.2	17.9
	US West		
	Denver	11.8	13.5
	Center City	15.5	33.4
	Suburbs	6.4	9.3

Consumer Federation of America (CFA) and Center for Media Education (CME) engaged an expert, Dr. Mark Cooper, to analyze two applications from each of the four companies. Dr. Cooper found:

> a clear and systematic pattern of not serving some lower income areas, which turn out to be much more heavily minority areas. . . . In virtually all cases, the areas served have a higher income than the areas not served . . . [and] the areas served have a lower percentage of non-minority residents than the areas not served.[54]

CFA and CME brought these findings to the attention of civil rights organizations, including the NAACP, National Council of La Raza, and the Office of Communication of the United Church of Christ.[55] Convinced of the seriousness of these trends, the groups decided to file a joint petition asking the FCC to address the redlining problem.

C. The Petitions Asking FCC to Address Redlining

The groups sought action from the FCC by filing two petitions, a Petition for Relief and a Petition for Rulemaking. The Petition for Relief presented Dr. Cooper's analysis of the maps and data contained in the 214 applications setting forth evidence of video dialtone redlining. The Petition contended that the "information superhighway" should not be built in a way that excludes the poor and minorities, further dividing our country among information "haves and have-nots."

Petitioners asserted two legal grounds for FCC action. First, they urged that the pattern of discrimination evidenced in the 214 applications was inconsistent with the universal service goal embodied in Section 1 of the Communications Act, which charges the FCC with making adequate communications facilities at reasonable charges available "to all the people of the United States."[56]

Second, acknowledging that it would take time to attain universal service, Petitioners urged that video dialtone networks be deployed and expanded only on a nondiscriminatory basis.[57] They alleged that the pattern of discrimination found in the 214 applications violated the prohibition against unjust or unreasonable discrimination in the provision of communications facilities set forth in Section 202(a) of the Communications Act.[58] Petitioners also argued that equitable representation of low-income and minority communities was necessary from the start to ensure that the diverse needs of these communities would be met, as well as for other customers to benefit from the programming and services developed in response to demands of racially and economically diverse communities.[59]

Thus, Petitioners called on the Commission to ensure progress toward the goal of universal service and to ensure that video dialtone is deployed equitably with respect to race, ethnicity, or income. They asked the Commission to adopt: (1) a policy statement announcing its commitment to the goals of universal video dialtone service and nondiscriminatory deployment at each phase of construction; (2) an interpretive rule clarifying that applicants seeking to construct and operate video dialtone facilities are required to adhere to the objective of universal service and to avoid discrimination on the basis of income, race, or ethnicity; and (3) a procedural rule instructing Commission staff to identify applications that violate these objectives, and to remand these applications to afford the telephone common carriers the opportunity to bring them into conformity with nondiscrimination requirements.

The Petition for Rulemaking asked the FCC promptly to initiate a rulemaking to insert a specific prohibition against redlining. The Petition asked that applicants be required to show that at each phase of deployment, they would make service available to low-income and minority residents in proportion to their presence in the relevant community.

Because the needs and characteristics of each community are best known to the residents of that community, Petitioners believed that community review and comment on the applications was essential. Although the 214 process permits public participation in theory, a number of obstacles exist in practice.

To comment on whether an application serves the public interest, members of the public must know that a telephone company has filed an application. Although the FCC puts out a public notice, only Washington lawyers are likely to learn of it. No notice is published in the Federal Register, much less in the communities actually affected by the deployment decisions. The Petition therefore requested that telephone companies be required to give notice in a local newspaper, just as applicants for broadcast licenses must give local notice.[60] The Petition also requested that applicants hold public hearings in affected communities to disclose such information as the area to be served, the areas not initially served, the schedule for deployment, and the kinds and approximate costs of services to be offered.

Another obstacle to public participation is the lack of relevant information in the 214 applications themselves. Applications filed with the Commission to date do not contain sufficient detail to determine whether the proposed deployment has the effect, much less the intent, of discriminating on the basis of race or income. Without knowing which census tracts are being served or bypassed, citizen groups, not to mention Commission staff, have great difficulty assessing whether proposed service areas have discriminatory effects. Therefore, the Petition for Rulemaking requested that applicants identify specific exchange areas to be served and include relevant census data for areas served and not served.

D. Reaction to Redlining Petitions

The Petitions received extensive press attention, including front page coverage in *The New York Times* and *USA Today*.[61] Telephone company reaction was swift and strong. US West promptly attacked Petitioners' allegations as "patently false."[62] In a letter to the FCC, Pacific Telesis denied any discrimination, claiming that it planned to provide advanced network services to all of its customers by the year 2010.[63] Bell Atlantic likewise denied any discrimination, but shortly thereafter revised its deployment plans for the Washington, D.C. metropolitan area to include more low-income and African American areas.[64]

The Commission quickly sought public comment on both petitions. While several organizations and state public utility commissions supported the requested relief, the RBOCs opposed it. Some RBOCs maintained that they have no duty to provide video dialtone service universally.[65] All denied discriminating, but provided little data to substantiate their claims. The Petitioners responded that the varying views of the RBOCs concerning their obligations under current requirements underscored the need for FCC clarification and for a uniform filing requirement to permit meaningful FCC and public scrutiny.[66]

As of December, the FCC had taken no action on the petitions.[67] In denying reconsideration of the Second Report and Order, however, the Commission noted the filings of the redlining petitions:

> The issues raised in the petitions deserve serious consideration, but we have not yet had an opportunity to review fully all of the information and arguments submitted in response to them. We are committed to careful review of the record and plan to act on these matters promptly.[68]

Thus, it appears that some action on the part of the FCC should be forthcoming shortly.

In the Reconsideration Order, the Commission also noted the recent failure of Congress to enact legislation, which had included provisions to facilitate telephone companies' entry into the video programming marketplace. It declared that "[t]he absence of such legislation only heightens the need for a regulatory framework, consistent with existing law, that eliminates unnecessary barriers to [telephone company] investment in video delivery systems."[69]

The same should be said with regard to redlining. The failure of legislation that would have included a prohibition against discriminatory deployment of video dialtone, described in the next section, heightens the need for prompt FCC action. Existing law already provides the framework for FCC action to uncover and prohibit redlining; what is needed is clarification and elaboration. Another important step — requiring telephone companies to include more detailed information in their applications — imposes a minimal burden, as the telephone companies already possess such information. Making this information widely available to the public, in turn, will assist the FCC in making the public interest determination required before granting § 214 applications.

III. The Clinton Administration, the 103rd Congress, and Redlining Prohibitions in Telecommunications Reform Legislation

A. Revisions to the Communications Act of 1934

In 1994, Congress, with the encouragement of the Clinton Administration, attempted to craft major revisions to the Communications Act of 1934. Telecommunications reform legislation in the 103rd Congress offered a promising opportunity to obtain firm prohibitions against electronic redlining. The legislation cleared the House by voice vote under suspension of the House rules.[70] However, it stalled and ultimately failed in the Senate amid end-of-the-session partisan gridlock and disagreement among industry groups vying for advantage under the legislation. Specific and comprehensive redlining prohibitions encountered vigorous opposition from the powerful Regional Bell Operating Companies.[71] Nonetheless, with relatively narrow participation from the civil rights community and without public support from the Administration, proponents achieved important legislative inroads on the redlining issue.

The 1934 Communications Act has stood with only minor changes for more than half a century as the framework for development of the telecommunications industry. The principal impetus for the 1994 reform effort was lawmakers' widely expressed desire to promote competition in the industry in order to reduce prices and to encourage construction of the "Information Superhighway." The cornerstone of the reform proposals was the elimination of legislative and judicial barriers that prevent local telephone, long-distance telephone, and cable companies from entering each other's markets.[72]

Despite their emphasis on fostering greater competition in the industry by relaxing regulation, both the House and Senate bills recognized the need to provide for the possibility of market failures in the new competitive environment. Both bills contained measures to guard against oligopoly domination of the industry. Furthermore, a major exception to the bills' deregulatory thrust was a continuation of the Communications Act's longstanding commitment to universal service obligations. Both bills included measures to protect the availability of basic services to customers in less economically viable areas. In somewhat the same vein, by the time each was voted out of committee, the bills also contained anti-redlining protections of varying effectiveness.

B. Unusual Obstacles to Adoption of Redlining Protections

Although telecommunications reform legislation provided a ready vehicle for enactment of redlining protections, several factors complicated adoption of these protections. The Committees with jurisdiction over the legislation were not particularly fertile ground for such proposals. The Senate and House Commerce Committees generally treat industry interests as their principal constituencies. The telecommunications industry in particular is a major source of fundraising for Committee members. Its lobbyists enjoy access to and relationships with Committee members and staff that public interest groups cannot hope to rival. Committee members and their staffs tended to view the legislation as a bill about and for corporate interests. What is more, the Committees contained few strong proponents of civil rights. Nor were many Committee members particularly susceptible to grassroots pressure on civil rights issues. For example, almost every member of the Senate Commerce Committee had an overwhelmingly white and rural constituent base.

Second, the most politically powerful corporations in the telecommunications industry, the Regional Bell Operating Companies, opposed strong redlining protections. After the filing of the video dialtone petition with the FCC, the RBOCs viewed the proposals as a serious threat, and devoted some of their massive lobbying resources to diluting them. In the Senate, the RBOCs were at the center of negotiations with Commerce Committee Chairman Ernest F. "Fritz" Hollings that were critical to the legislation's prospects of passage at the end of the 103rd Congress. Although that dispute concerned conditions for RBOC entry into the long-distance market, it severely limited the Chairman's ability to confront the RBOCs on other issues. By the end of the session, the RBOCs exercised near veto power over timely Senate passage of the legislation.

Third, most of the traditional civil rights community did not make redlining protections a legislative priority in the 103rd Congress. Organizations understandably devoted resources to important legislative battles on more immediate and familiar issues, such as health care, the death penalty, educational equity, etc. Lacking familiarity with telecommunications issues or considering them a less pressing concern for their constituencies, most did not participate in the drive for redlining protections. Ralph Nader's Taxpayer Assets Project — not traditionally known as a civil rights organization — among Washington advocacy organizations was the principal proponent of the strongest anti-redlining language incorporated in the House or Senate bills. Conversely, some local chapters of prominent civil rights organizations that have close relationships with certain RBOCs lobbied on behalf of the RBOCs' interests in other aspects of telecommunications reform. The combined effect was to diminish the profile of telecommunications redlining as a civil rights issue.

Finally, redlining proposals did not receive strong support from the Clinton Administration or the Democratic leadership. The Administration and congressional leaders very much wanted to obtain legislation, and were very reluctant to embrace strong civil rights language that might draw criticism from conservative Republicans. Despite its encouraging rhetoric, the Administration did not make redlining protections a legislative priority. Assistance from the Administration was entirely behind-the-scenes. However, the Administration did not play a particularly visible role in shaping the Senate and House bills. The Administration even decided in early 1994 to abandon any public legislative proposals in an attempt to shelter telecommunications reform from the partisan obstruction that began to grip the Senate.

C. Elements of an Effective Redlining Prohibition

Experience in the FCC video dialtone proceedings indicated that the following would be the most important elements of an effective redlining prohibition:

- *Conditioning Permission to Deploy New Services on Non-discrimination*. For advanced telecommunications, redlining occurs in the deployment of new services. Therefore, so long as carriers must seek regulatory approval to provide new services, discrimination should be dealt with as part of the approval process — as a condition for obtaining approval of the new service.
- *A discriminatory effects standard.* Communities excluded from the benefits of advanced telecommunications services will be disadvantaged regardless of whether the exclusion is attributable to discriminatory intent or effect. Furthermore, even if a carrier acts with invidious intent, its intent would be all but impossible to uncover. Carriers deploying advanced telecommunications services are both highly sophisticated and ably represented by counsel. They are unlikely to leave a trail of "smoking gun" evidence of discriminatory intent. Conversely, the FCC staff that reviews applications to provide service lacks the resources to conduct fishing expeditions for "smoking gun" evidence of intent.
- *Submission of census data on proposed service areas.* The video dialtone petition revealed that citizen groups would only be able to obtain demographic information about carriers' service areas at significant difficulty and expense. The RBOCs did not supply demographic data on their proposed service areas. What is more, boundaries of the service areas did not conform to census blocks, the units by which the Census Bureau collects information on population groupings by race and income. In order to permit public and regulatory oversight of carriers' deployment patterns, data must be submitted in a clear and uniform format, ideally based upon census boundaries.

In addition, other features would be highly desirable elements of a strong redlining prohibition. A private right of action to enforce the prohibition would offer an important safeguard in the event that the FCC or state agency failed to enforce the prohibition. Attorneys' fee and expert fee provisions would in turn ensure that private attorneys general could afford to litigate under the statute. A procedure for public notice and hearings at the local level on proposed service areas could serve a helpful function of educating carriers to the needs and potential market in bypassed communities.

D. Results in the House and Senate Bills in the 103rd Congress

Both the House and Senate bills, H.R. 3636 and S. 1822, contained redlining prohibitions. Of the two, H.R. 3636 contained the superior redlining provision. Rep. Bill Richardson (D-NM), a member of the House Hispanic Caucus, offered the anti-redlining amendment in the Telecommunications and Finance Subcommittee of the Energy and Commerce Committee. The amendment was adopted by voice vote. It provided that the FCC should adopt regulations to:

> prohibit a common carrier from excluding areas from their geographic service area on the basis of the ethnicity, race or income of the residents of that area, and provide for public comments on the adequacy of the proposed service area on the basis of the standards set forth under this subsection.

H.R. 3626, § 653(b)(1)(G).[73] Report language specified that this provision created "an affirmative obligation to build-out new video dialtone service in a manner that does not disadvantage communities on the basis of the ethnicity, race, or income of the[ir] residents."[74] It further stated that the FCC had remedial authority under the provision to condition, revoke or deny authorizations to provide service or other benefits in the event of noncompliance with the provision.[75]

In permitting a discriminatory effect test and conditioning FCC licenses and authorizations on compliance, the amendment offered two of the three critical features of an effective redlining amendment discussed *supra*. The third, requiring carrier submission of demographic on served and adjoining unserved areas, could readily have been set forth in a subsequent FCC rulemaking.

Ralph Nader's Taxpayer Assets Project played a central role rallying support for the amendment. Assistant Secretary Larry Irving of the Commerce Department's National Telecommunications & Information Administration played a behind-the-scenes role helping to win support for the measure during the subcommittee mark-up. The amendment was approved without dissent. Nor did it interfere with passage of H.R. 3636 by voice vote in the House on June 28.

However, by August 11, when the Senate Commerce Committee finally had struck the deals necessary to proceed to mark up S. 1822, redlining was a far more contentious issue. Although Sen. John Kerry (D-MA) pressed Chairman Hollings' Commerce Committee staff to include more specific redlining language than that approved by the House, Hollings' staff refused to include more explicit language than that approved on the House side. Staff feared opposition from conservative Republicans and lack of support from ranking member Sen. John Danforth (R-MO). Instead, Hollings' and Danforth's staff crafted alternative language stating that:

> In considering any application under section 214, the Commission shall ensure that access to such applicant's telecommunications services is not denied to any group of potential subscribers because of their race, gender, national origin, income, age, or residence in a rural or high-cost area.

S. 1822, § 229(g), 103rd Cong. 2d Sess. The Committee report language tracked the House report in giving the FCC authority to condition, revoke, or deny authorizations or benefits in the event of noncompliance. However, it was somewhat more equivocal on whether carriers were subject to a discriminatory effects test. It noted that "common carriers should ensure that their facilities are built out in a manner that does not disadvantage [applicable] communities."[76] It also specified that residents of communities containing "substantial numbers" of such residents enjoy "the right to choose . . . advanced telecommunications and information services on approximately the same timetable as other Americans."[77]

The combination of this slightly vaguer report language and substitution of the phrase "deny access because of" for "exclude on the basis of" would have left somewhat more room for the FCC to interpret the section as containing only a discriminatory intent test. As discussed *supra*, this limitation would make the provision virtually unenforceable due to the difficulties of uncovering discriminatory intent, even on the basis of income, in the context of deployment of advanced telecommunications services.

Of course, S. 1822 foundered amid the continued opposition of several RBOCs and attacks on the legislation as overly regulatory by Minority Leader

Bob Dole (R-KS) and John McCain (R-AZ). However, the continued need for telecommunications reform legislation ensures that there will be future opportunities to write redlining prohibitions into law.

III. What Lies Ahead

To date, neither the FCC nor Congress have taken action to address the problem of telecommunications redlining. However, the next two years will almost certainly see some resolution — be it positive or negative — of calls for action on this issue because the FCC is all but certain finally to rule on the video dialtone petitions. In addition, Congress will again attempt to overhaul the Communications Act of 1934.

The 1994 elections sweeping Republicans into control of the House and Senate have made prompt and decisive FCC action against redlining all the more important. Congressional action on the legislation and the related redlining issue may be delayed again. Furthermore, there is room to doubt whether legislation approved by the new Congress would take serious action on the issue. To date, incoming Republican Commerce Committee Chairman Larry Pressler (R-SD) and House Telecommunications & Finance Subcommittee Chairman Jack Fields (R-TX) have signalled that they will craft less regulatory bills than H.R. 3636 or S. 1822. However, each incoming chairman supported these bills last year with redlining language in them. Furthermore, Senator Pressler has warned of the danger of "telecommunications apartheid in this country," and expressly acknowledged the problem of inner-city and rural communities being bypassed for advanced services."[78] Nonetheless, it remains uncertain whether Pressler, Fields and other Republican leaders consider redlining an issue that requires a strong legislative solution.

In this new climate, it is up to the Administration and the FCC Chairman to back up their rhetoric about information "haves" and "have nots" with concrete action. The steps that the FCC has been asked to take are simple and need not require a great deal of resources. An important step — clarifying that it is the FCC's existing policy that video dialtone must be deployed on a non-discriminatory basis — would not even require a rulemaking. Simply clarifying FCC policy to spell out these standards might do much to curtail video dialtone redlining.

Promulgating strong regulations would be a major step. However, to achieve an enduring victory on this issue, the Administration should work with proponents in Congress and with the civil rights and public interest community for codification of meaningful redlining safeguards. Chairman Pressler has enlisted the Administration's help in achieving passage of telecommunications reform legislation.[79] With the onus of delivering legislation for the telecommunications industry now squarely on the Republican leadership in Congress, the Administration is in a position forcefully to assert principles that must be part of that legislation if it is to become law. Meaningful nondiscrimination protections go to the core of the Administration's agenda, and should be part of these demands.

Unless the Administration takes action soon, the Vice President's and the Chairman's vision of the information superhighway as "a way for millions of Americans to bridge the gaps in education, health care, and economic opportunity that divide our country"[80] cannot become a reality. Nor will the Administration's agenda for the NII be realized.

IV. Recommendations for Action by the FCC and the Clinton Administration

1. The FCC should promptly clarify that its existing § 214 policy requires that video dialtone be deployed in a nondiscriminatory manner toward the goal of universal service:
   (a) The Commission should issue a policy statement announcing its commitment to the goals of universal video dialtone service and nondiscriminatory deployment at each phase of construction;

   (b) The Commission should adopt an interpretive rule clarifying that applicants seeking to construct and operate video dialtone facilities are required to adhere to the objective of universal service and to avoid discriminating on the basis of income, race, or ethnicity;
   (c) The Commission should adopt a procedural rule instructing its staff to identify applications that violate these objectives, and afford the applicants the opportunity to bring them into conformity with nondiscrimination requirements;

2. The Commission should promptly initiate a rulemaking to adapt the § 214 process to address the problem of video dialtone redlining by:
   (a) Requiring that carriers demonstrate — as part of their burden to establish that their § 214 application serves the public interest — that their proposed deployment has neither the purpose nor the effect of discriminating on the basis of race, national origin, or income;
   (b) Requiring compliance with nondiscrimination requirements as a condition for authorization to deploy new services;
   (c) Requiring that carriers' video dialtone applications contain census-tract level demographic data on proposed service areas in a format that permits easy inspection by the public and the FCC; and
   (d) Requiring that carriers provide public notice and hearings at the local level on proposed deployment plans.
3. The Administration should insist that any telecommunications reform legislation that passes the 104th Congress, at a minimum:
   (a) Contains a discriminatory effects standard;
   (b) Requires nondiscrimination as condition for authorization to deploy new service, or to receive authorizations, permits, licenses, or other benefits; and
   (c) Requires submission of demographic data on proposed service areas in a format that permits easy inspection by the public and the FCC.

Endnotes

[1] National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49025 (1993) (hereinafter NII Agenda).

[2] NII Agenda, 58 Fed. Reg. at 49026. The NII Agenda estimates that in recent years, U.S. companies have invested more than $50 billion annually in telecommunications infrastructure. *Id.*

[3] "Telephone-Cable Competition Could be Costly, Moody's Forecasts," *Communications Daily*, at 2 (Nov. 2, 1994).

[4] The seven RBOCs are: Ameritech Corp., Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., and US West, Inc. Sometimes called the "Baby Bells," these companies were formed when AT&T was broken up as result of an antitrust consent decree.

[5] The RBOCs received $67 billion in local telephone revenue in 1992. J. Lande, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, FCC Report, at 8 (Mar. 1994).

[6] The RBOCs own telephone operating companies that collectively provide local telephone service to approximately 80% of the 84 million households in the United States with telephones. National Telecommunication & Information Administration, U.S. Department of Commerce, NTIA Special Bull. No. 88-21, *NTIA Telecom 2000*, at 203 (1988).

[7] *See, e.g.,* Hatfield Associates, Inc., *Cross-Subsidy Concerns Raised by Local Exchange Carrier Provision of Video Dialtone Services*, at 1 (March 29, 1993).

[8] *See, e.g., Hearings Before the House Subcommittee on Telecommunications & Finance of the Committee on Energy & Commerce on H.R. 3626 and H.R. 3636*, 103rd Cong. 2d Sess., [Hereafter "*Hearings on H.R. 3626 and H.R. 3636*"], No. 103-104, at 508 (Feb. 10, 1994) (testimony of Philip J. Quigley) (noting "major investments" by several RBOCs in cable companies).

[9] Rules initially adopted by the FCC in 1970 and codified by Congress in the 1984 Cable Act prohibit telephone companies from providing video programming services to consumers in areas where they also offer telephone service. See 47 C.F.R. §§ 63.54-58; 47 U.S.C. § 613(b). The rules were intended both to prohibit anti-competitive conduct by telephone companies and to promote program diversity. Several RBOCs have successfully challenged the constitutionality of this prohibition as violating their First Amendment rights. *See, e.g., Chesapeake & Potomac Tel. Co. v. United States*, 1994 U.S. App. LEXIS 32985 (4th Cir. Nov. 21, 1994); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *appeal pending*.

[10] Telephone Company-Cable Television Cross-Ownership Rules, Notice of Inquiry, 2 FCC Rcd. 5092 (1987).

[11] Telephone Company-Cable Television Cross-Ownership Rules, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd. 300 (1991)(First Report and Order), *recon.* 7 FCC Rcd. 5069 (1992), *aff'd*, *National Cable Television Association v. FCC*, 33 F.3d 66 (D.C. Cir. 1994); Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5782 (1992) (Second Report and Order), *recon.* FCC 94-269 (released Nov. 7, 1994), *appeal pending sub nom.* Mankato Citizens Telephone Company, D.C. Cir. No. 92-1404 (filed Sept. 9, 1992).

[12] 47 U.S.C. § 214.

[13] *National Cable Television Association v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

[14] *See, e.g., Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 401 (S.D. Fla. 1991).

[15] 47 U.S.C. § 541(b)(3).

[16] *See, e.g., Hearings on H.R. 3626 and H.R. 3636*, No. 103-12, at 181, 183 (Mar. 24, 1993) (testimony of Richard H. Brown, Vice-Chairman, Ameritech Corporation) (discussing RBOCs' plans to provide "new voice, data

and video services," including "two-way video conferencing").

[17] See Electronic Frontier Foundation, *Innovative Services Delivered Now: ISDN Applications At Home, School, the Workplace*, 10-12 (Jan. 1993) (describing distance-learning projects already underway in four states using advanced wired delivery systems).

[18] *See, e.g., Hearings on H.R. 3626 and H.R. 3636*, No. 103-12 at 184 (Mar. 24, 1993) (testimony of Richard H. Brown) ("access will allow students in rural areas or in the inner city to participate in classes that their schools could not offer within the traditional classroom setting, minimizing geographic disparities in the U.S. education system.")

[19] *Id.* at 183 ("Advanced applications such as two-way video conferencing could allow doctors to 'examine' patients from their homes or at distant clinics.")

[20] *Id.* at 184 ("a modem, service-oriented economy requires information-intensive businesses. Those businesses will go where advanced telecommunications services and capabilities are available.")

[21] The Democracy Network, based at the University of Southern California's Center For Governmental Studies, has already developed promising interactive programming that permits users to view full-motion video statements of candidates for office, participate in discussions of issues. *See* F. Rose, "Democracy Goes On Line in California," WALL STREET JOURNAL, at B1 (Oct. 26, 1994); *see also* W. Powers, "Virtual Politics: Campaigning in Cyberspace," WASHINGTON POST, at E1, E6 (Nov. 8, 1994) (discussing the Democracy Network and other on-line information sources on candidates and elections).

[22] For example, the University of Southern California's Center For Governmental Studies is deploying an information service providing health, education, employment and political information to low-income areas in South Central Los Angeles. "Description of the Center for Governmental Studies' *Connect California and Connect America* Projects," Unpublished Report of the Center For Governmental Studies (no date).

[23] *Hearings on H.R. 3626 and H.R. 3636*, No. 103-12, at 184 (Mar. 24, 1994).

[24] For example, Tulare County, California, offers AFDC recipients touch-screen kiosks at central locations through which to apply for and obtain information about government benefits. The touch screen system offers service in several languages — English, Spanish, Korean, and Vietnamese. M. Naman, "The Tulare Touch: County's Welfare System Aims for Dignity," NEWMEDIA AGE, at 32 (May 1991).

[25] The "affinity groups" presently found on the Internet and commercial on-line services offer an illustration of the potential for public discussion using printed text alone. If they reserve capacity for such public discussion, advanced telecommunications networks should offer more accessible opportunities for public discourse.

[26] INFO/CAL, an experimental California program, already offers information on 90 different government programs and services, in such areas as employment, health care, education, consumer, child and family concerns. Its most popular service is "Job Match," a program that allows users to query available jobs by region and pre-register for job referrals. Presently, INFO/CAL is available at a very limited number of locations in California. Advanced telecommunications networks could conceivably make such services available in every home, in a wide variety of languages.

[27] Useful applications of these technologies will require extensive software programming and test-marketing. However, even carefully and well developed programs will have little social impact unless users are accustomed to and comfortable with the technology itself. The latter step could take years after advanced services are made available in a community.

[28] NII Agenda, 58 Fed. Reg. at 49025.

[29] The NII Agenda claims that the NII "will help create high-wage jobs, stimulate economic growth, enable new products and services, and strengthen America's technological leadership. Whole new industries will be created, and the infrastructure will be used in ways we can only begin to imagine." 58 Fed. Reg. at 49031.

[50] "The best schools, teachers, and courses would be available to all students, without regard to geography, distance, resources, or disability." *Id.* at 49025. The infrastructure can be harnessed to "prepare our children for the fast-paced workplace of the 21st century." *Id.* at 49031. The NII Agenda give several examples of educational applications of the NII. *Id.* at 49034.

[51] The NII Agenda claims that the NII can help solve the health care crisis by reducing cost and improving quality and access. Proposed applications include (1) telemedicine, or the use of telecommunications to consult with medical specialists in a different location; (2) unified electronic insurance claims; (3) promoting prevention and helping patients to care for themselves; and (4) computer-based patient records. *Id.* at 49032-33.

[52] For example, the NII Agenda notes that "you could obtain government information directly or through local organizations like libraries, apply for and receive government benefits electronically, and get in touch with government officials easily." *Id.* at 49026. Moreover, the NII Agenda suggests that government can cut costs by using "electronic benefits transfer" for programs such as federal retirement, social security, unemployment insurance, AFDC, and food stamps, estimating that $1 billion would be saved over five years by using electronic benefits transfer for food stamps alone. *Id.* at 49034. To realize such savings, however, the recipients of food stamps and other government benefits will have the means to receive them electronically.

[53] The NII Agenda claims that the infrastructure can be used to "build a more open and participatory democracy at all levels of government." *Id.* at 49031. The NII can expand citizens' capacity for action in local institutions by providing information and can improve the delivery of government information to taxpayers. *Id.* at 49033.

[54] 47 U.S.C. § 151.

[55] NII Agenda, 58 Fed. Reg. at 49028. To this end, the National Telecommunications and Information Administration (NTIA), which is part of the Department of Commerce, initiated an inquiry on Universal Service issues in September 1994. 59 Fed. Reg. 48112 (Sept. 19, 1994).

[56] 58 Fed. Reg. at 49028.

[57] NII Agenda, 58 Fed. Reg. at 49025.

[58] *Id.* at 49028.

[59] Remarks Prepared for Delivery by Vice President Al Gore, Royce Hall, UCLA, Los Angeles, CA, at 8 (Jan. 11, 1994).

[60] Remarks Prepared for Delivery by Vice President Al Gore to the National Association of Black-Owned Broadcasters, Washington, D.C., at 4 (Sept. 16, 1994).

[61] Remarks of Reed E. Hundt Before the First Annual Action for Children's Television Lecture on Media and Children, at 2 (Feb. 28, 1994).

[62] 1994 National Urban League Conference, at 8 (July 26, 1994).

[63] First Report and Order, 7 FCC Rcd. at 304-05.

[64] *Id.* at 305-06.

[65] *Id.* at 306.

[66] *See, e.g.*, Comments of Consumer Federation of America (CFA) and Office of Communication of the United Church of Christ OC/UCC), CC Docket No. 87-266, at 6-17 (filed Feb. 3, 1992) (supporting goals of universal service, diversity and competition, but expressing concern that the proposal failed to advance these goals); Comments of the National Center for Law and Deafness *et al.*, CC Docket No. 87-266, at 3-4 (filed Jan. 31, 1992) (supporting goal of universal service but expressing concern that FCC's proposal failed to meet needs of disabled persons).

[67] Comments of CFA and OC/UCC at 1-5. OC/UCC also expressed concern that reliance on market forces would fail to ensure that video dialtone meets the needs of the disabled and socially disadvantaged. Reply Comments of OC/UCC at 8-14 (filed March 5, 1992). OC/UCC pointed out that telecommunications marketing

consultants were advising the industry to focus marketing efforts on the communities with upscale demographics, and pointed out that communities selected for trials, such as Cerritos, California, and Arapahoe County, Colorado, were far wealthier than the national norm and had relatively small numbers of Africans Americans. *Id.* at 10-11.

[48] *See, e.g.*, Second Report & Order, 7 FCC Rcd. at 5820 (Commission will use 214 process to "more fully evaluate whether particular proposals do serve the public interest."); *Id.* at 5823 (Commission prepared to use 214 process to impose additional safeguards against anti-competitive conduct). Many parties sought reconsideration of the Second Report and Order. On reconsideration, the FCC reaffirmed its decision to utilize the 214 process. It found that "[b]ecause video dialtone is based upon new and evolving technologies, the Section 214 process is critical to our ability to ensure that video dialtone is implemented in a manner that best serves the public interest." *Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking*, FCC slip op. No. 94-269, at ¶ 137 (released Nov. 7, 1994) ("*Reconsideration Order*").

[49] 47 U.S.C. § 214.

[50] *Reconsideration Order* at ¶ 125. *See also* 47 C.F.R. § 63.01.

[51] *See, e.g., C&P Telephone, Arlington Virginia*, 8 FCC Rcd. 2313 (1993) (granting authority for technical trial to test new technology using 400 Bell Atlantic employees).

[52] Affidavit of Dr. Mark N. Cooper, at ¶ 24 (May 19, 1994), attached to Petition for Relief of Center for Media Education *et al.* (filed with FCC on May 23, 1994) ("Cooper Affidavit").

[53] Cooper Affidavit, at ¶ 19. In June 1994, Bell Atlantic amended its 214 application to include portions of both these previously excluded jurisdictions.

[54] Cooper Affidavit, at ¶ 18. Dr. Cooper prepared two charts. The first shows average household income in served and unserved areas. The second shows the percentage of minorities in the served and unserved areas.

[55] OC/UCC had independently analyzed the video dialtone application of Ameritech for the Chicago area and found a similar pattern of discrimination. See Declaration of Anthony L. Pharr (May 19, 1994), attached to Petition for Relief of Center for Media Education, *et al.* (filed with FCC on May 23, 1994).

[56] 47 U.S.C. § 151.

[57] Petition for Relief, at 10-14.

[58] 47 U.S.C. § 202(a).

[59] *Id.* at 12.

[60] Petition for Rulemaking, at 4, citing 47 C.F.R. § 73.3580(c)(1).

[61] S. Lohr, "Data Highway Ignoring Poor, Study Charges," NEW YORK TIMES, at A1 (May 24, 1994); P. Wiseman, "FCC told poor left off info highway," USA TODAY, at A1 (May 24, 1994).

[62] Opposition to Petition for Relief, at 6 (filed with FCC on June 2, 1994).

[63] Letter to William F. Caton from Alan F. Ciamporcero (June 2, 1994).

[64] News Release, "Bell Atlantic Seeks FCC Approval for Construction of Full Service Network in Six Metropolitan Areas," (June 16, 1994). In the news release, Bell Atlantic Vice President Edward Young is quoted as saying: "This filing also should put to rest any concern about so-called 'electronic redlining.' The racial diversity in the areas served by this new network is greater than that in the overall Bell Atlantic territory."

[65] *See, e.g.*, Opposition of BellSouth, at 4 (July 12, 1994).

[66] *See* Comments of CME, *et al.*, DA 94-621 (filed July 12, 1994); Reply Comments of CME, *et al.*, RM 8491 (filed July 27, 1994).

[67] During the summer, the FCC granted the first non-experimental video dialtone application. *New Jersey Bell Telephone Co.*, 9 FCC Rcd. 3677 (1994), *recon. pending*. Although this application by New Jersey Bell Telephone Company, a subsidiary of Bell Atlantic, for Dover Township, New Jersey, was one of the ones analyzed by Dr. Cooper and found to evidence discriminatory patterns, the FCC's order granting the application did not

address that issue. It did, however, condition approval, among other things, on compliance with any changes in the FCC's video dialtone rules. *Id.* at 3690.

[68] Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking, FCC 94-269, at 9, n.22 (Nov. 7, 1994).

[69] *Id.* at 6.

[70] Cong. Rec., 103rd Cong. 2d Sess., at H.5248 (June 28, 1994).

[71] The RBOCs together took in $67 billion in local telephone revenue in 1992. J. Lande, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, F.C.C. Report, at 8 (Mar. 1994). That year, they spent $40 million on lobbying alone, and spent $95 million on grassroots causes within their service areas. In the words of a *Wall Street Journal* feature story, they "field a lobbying army as pervasive as the dial tone on every telephone." R. Wartzman & J. Horwood, "For the Baby Bells, Government Lobbying Is Hardly Child's Play," WALL STREET JOURNAL, at A1 (Mar. 10, 1994).

[72] The modified final judgment in the ATT anti-trust case, *United States v. ATT*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), prohibits local telephone companies from providing long-distance service. The cable/telephone cross-ownership restrictions contained in the 1984 Cable Act prevent companies in these industries from competing in each other's markets. 47 U.S.C. § 533(b).

[73] The Richardson amendment was offered to H.R. 3636, the portion of the House bill that was reported out of the Energy and Commerce Committee bill. H.R. 3636 was later merged with H.R. 3626, the Judiciary Committee's bill on the same issue.

[74] H. Rep. No. 103-560, 103rd Congress, 2d Sess., at 68.

[75] *Id.*

[76] S. Rep. No. 103-367, 103rd Cong. 2d Sess., at 53.

[77] *Id.*

[78] K. Victor, "What Pressler's Promising," NATIONAL JOURNAL, at 2786 (Nov. 26, 1994).

[79] *See, e.g.*, K. Victor, "What Pressler's Promising," NATIONAL JOURNAL, at 2786 (Nov. 26, 1994).

[80] Remarks of FCC Chairman Reed E. Hunt Before the 1994 National Urban League Conference, at 8 (July 26, 1994).

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Working Papers

Minority Poverty

Chapter IV

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Federal Resources and Funding

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An Unseen Attack on Civil Rights: The Anti-Regulatory Agenda in the Contract With America

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Chapter VII

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Chapter XI
In Search of A Vision: Gender Equity in Education in the Clinton Administration

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Chapter XIV

Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity

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Housing

Chapter XV

Federal Fair Housing Enforcement: The Clinton Administration at Mid-Term

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Immigration

Chapter XVI

Immigrants and Public Services: Some Principles for Reform

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Hate Crimes

Chapter XVII

Federal Action to Confront Hate Crimes: Preventing Violence and Improving Police Response

Michael Lieberman has been the Washington Counsel for the Anti-Defamation League since 1989, having previously served as the League's Midwest Civil Rights Director in Chicago. He has participated in a number of workshops and seminars on hate crimes, hate groups, and the First Amendment, and has written extensively on the community impact of anti-Semitic and racist incidents. He was actively involved in securing passage of the federal Hate Crimes Statistics Act, and since then has served as a principal resource for the FBI in developing outreach and education materials on the Act. Mr. Lieberman received his B.A. from the University of Michigan and his law degree from Duke University.

Environmental Justice

Chapter XVIII

Access to Justice: Environmental Justice

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Health

Chapter XIX

Minority Health Care Issues

Maya Wiley, currently an Assistant U.S. Attorney in the Southern District of New York, was a staff attorney at the NAACP Legal Defense and Educational Fund, Inc. during the preparation of this report, where she specialized in litigation to increase access to health cares services for African Americans and lobbied extensively on health care reform. Ms. Wiley received her law degree from Columbia University School of Law and clerked for the Honorable James T. Giles of the U.S. District Court for the Eastern District of Pennsylvania.

Chapter XX

Invisible Women: Uncovering the Health Care Problems Faced by Women of Color

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Rights of Persons with Disabilities

Chapter XXI

ADA and the Clinton Administration

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Information Superhighway

Chapter XXIII

Electronic Redlining: Discrimination on the Information Superhighway

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Other Contributors

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